

Vol. 1
TRANSCRIPT OF RECORD

(Pages 1 to 340).

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 323.

UNITED STATES OF AMERICA, EX REL DAVID
DARCY, PETITIONER,

VS.

EARL D. HANDY, WARDEN OF BUCKS COUNTY
PRISON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 15, 1955

CERTIORARI GRANTED OCTOBER 24, 1955

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Appendix

I.

RELEVANT DOCKET ENTRIES.

April 3, 1951. Petition for Writ of Habeas Corpus and Rule to Show Cause.

April 3, 1951. Order of Court (FVF) fixing Thursday the fifth day of April 1951, at ten o'clock A. M. at Scranton for a hearing on petition. Further ordered and decreed that the execution of the death penalty be stayed and continue to be so stayed until after the court has acted and finally disposed of the petition, and that respondents produce body of the relator at the time and place fixed hereby for said hearing.

April 3, 1951. (Nunc pro tunc) (Received in Clerk's Office April 17, 1951)

Answer of John W. Claudy, Warden of Western State Penitentiary to petition for writ of Habeas Corpus.

April 5, 1951. Hearing held in Scranton before Hon. Albert L. Watson and Hon. John W. Murphy.

April 5, 1951. Order that the stay of execution heretofore granted be continued until 10:00 A. M. Tuesday, April 10, 1951. In the event that the Supreme Court of Pennsylvania does not grant a stay of execution, it will be necessary for further application to be made to this Court before the stay order is continued (ALW) (JWM).

April 11, 1951. Order that petition for writ of habeas corpus and rule to show cause, filed April 3, 1951, is dis-

Relevant Docket Entries

missed, and that prayer of relator for a stay of execution is denied. Memorandum opinion will be filed forthwith (ALW) (JWM).

April 11, 1951. Notice of Appeal of the Order entered this date.

April 14, 1951. U. S. Court of Appeals, Docket No. 10,447. Certified copy of U. S. Court of Appeals order staying execution of Darcy pending hearing and determination of Appeal.

May 17, 1951. Opinion of Court re relator's petition for a writ of Habeas Corpus and a stay of execution, and the Commonwealth of Pennsylvania's motion to dismiss the petition as insufficient at law (M) and Concurrence of Judge Watson.

March 25, 1953. Opinion "The Judgment of the Court below will be reversed with the direction to enter an order staying Darcy's execution until the disposition by the Court below of the instant case on remand on the issue of alleged hysteria and prejudice. The Court below will be directed to strike from the petition for habeas corpus the jurors' letters attached thereto. The stay order entered by this Court will be vacated" (USC of A).

March 28, 1953. (Biggs, Chief Judge, U. S. Court of Appeals)

"The opinion of Chief Judge Biggs filed on March 24, 1953, in the above entitled case, is hereby amended as follows:

"By inserting the phrase 'what he believed to be' before the word 'his' in the 22nd line of page 14 of the printed opinion." Biggs, Chief Judge.

November 4, 1953. Mandate—the judgment of the said District Court in this case be, and the same is hereby reversed, with direction to enter an order

Relevant Docket Entries

staying Darcy's execution until the disposition by the court below of the instant case on remand on the issue of alleged hysteria and prejudice; and to strike from the petition for habeas corpus the jurors' letters attached thereto. Copies of mandate handed to Judge Watson and Judge Murphy.

November 5, 1953. Order—It is hereby ordered and decreed that the execution of the death penalty of David Darcy be stayed and continue to be so stayed until after this Court has acted upon and finally disposed of the petition of David Darcy seeking a writ of habeas corpus (W and M).

January 22, 1954. Clerk's minutes—conference of attorneys of record and Judge Murphy to fix a date for hearing. Date fixed 2-17-54, at 10:00 A. M. at Scranton, Pa.

February 10, 1954. Order continuing hearing from 2-17-54 to 3-9-54, at 2:00 P. M. at Scranton, Pa. (M).

February 17, 1954. Order continuing hearing from 3-9-54 to 3-11-54, at 10:00 A. M. at Scranton, Pa. (M).

March 5, 1954. Motion of Attorney General of Pennsylvania to discharge Rule to Show Cause.

Notice that Motion discharge Rule will be brought on for hearing 3-11-54, at 10:00 A. M.

Order directing the Attorney General of Pennsylvania to produce the person of David Darcy at the U. S. Court in Scranton, Pa., at 10:00 A. M. on 3-11-54 (M).

March 11 to 20, 1954, inclusive. Clerk's Minute Sheets of proceedings held on March 11, 12, 13, 16, 17, 18, 19 and 20th, 1954.

March 12, 1954. Order that the jurors' letters attached to the petition for Habeas Corpus be and they are hereby stricken from the record (W & M).

Relevant Docket Entries

March 16, 1954. Relator's Motion to amend petition for writ of Habeas Corpus and Rule to Show cause, and Order allowing motion (M).

May 28, 1954. David Darcy's Petition to reopen hearing.

June 12, 1954. Motion to Dismiss Petition to Reopen Hearing and Notice that Motion will be brought on for hearing at Scranton, Pa., on June 28, 1954, at 2 o'clock P. M.

July 10, 1954. Affidavit of Ernest M. Leedom.

July 12, 1954. Affidavit of C. LeRoy Murray, and Affidavit of Walter C. Schroeder.

August 5, 1954. Affidavit of J. Dress Pannell, Affidavit of Inez D. Heckman.

October 8, 1954. Transcript of Proceedings held March 11, 12, 13, 16, 17, 18, 19, 20, 1954.

November 10, 1954. Order that Relator's Petition to reopen hearing is denied (W & M).

Order that the Court being advised that the transcript of Testimony in this case having been filed and copies thereof forwarded to respective counsel of record, Court fixed Friday, December 3, 1954, at 11:00 A. M. Scranton, Pa. Court Room No. 2, as the time and place for hearing argument and the submission of requests for findings of fact and conclusions of law (W & M).

December 3, 1954. Clerk's Minute Sheet re arguments on Findings of Facts and Conclusions of Law. Court to render decision later.

February 12, 1955. Opinion re relator's petition for writ of Habeas Corpus (M & W).

Order that for reasons set forth in an opinion handed down this date, relator's petition for a writ of Habeas Corpus is denied, and the stay order entered by this Court heretofore, to wit, on the

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Show Cause*

5th day of November, 1953, is hereby terminated
(M & W).

February 18, 1955. Notice of Appeal from order of Feb.
12, 1955. Clerk's Minute Sheet—re hearing on
Motion for Certificate of Probable Cause.

February 19, 1955. Appendix to Opinion (M).

February 21, 1955. Order that relator's request for Cer-
tificate of Probable Cause is hereby denied (M).

February 24, 1955. Card from U. S. Court of Appeals ac-
knowledging receipt of Notice of Appeal.

II.

PLEADINGS.

(1)

PETITION FOR WRIT OF HABEAS CORPUS AND
RULE TO SHOW CAUSE.

TO THE HONORABLE, THE JUDGES OF THE UNITED
STATES DISTRICT COURT FOR THE MIDDLE DIS-
TRICT OF PENNSYLVANIA:

The petition of David Darcy respectfully represents:

1. That the relator was indicted for the murder of Wil-
liam Kelly in the Court of Oyer and Terminer of Bucks
County, to No. 37, February Term, 1948, and upon entering
a plea of not guilty was tried before the Honorable Hiram
H. Keller and a jury, wherein the jury returned a verdict

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of guilty of murder in the first degree and fixed the penalty at death.

2. At such trial, the relator was not permitted by his counsel to take the witness stand in his own defense nor did his counsel produce any witnesses as to the background, or personal history, or mental condition, or previous good behavior, or character, or reputation of the relator. All of which evidence was readily available, favorable to the relator and would have had great influence with the jury in their determination of the guilt and punishment of the relator.

3. That the Court of Oyer and Terminer of Bucks County denied the relator a new trial and affirmed the conviction and judgment of sentence.

4. That upon appeal to the Supreme Court of Pennsylvania, such conviction and judgment of sentence were affirmed in an opinion by the late Chief Justice Maxey, reported in Commonwealth vs. Darcy, 362 Pa. State Reports, 259, to which Justice Jones dissented.

The majority opinion contained the statement that "he (Darcy) did not testify and no evidence was given in his behalf."

5. That a petition was presented in behalf of the relator to the Supreme Court of the United States for a certiorari, which was denied without opinion.

6. That an application was made by the relator to the Board of Pardons for clemency, which was finally refused on March 21, 1951, and the request for a rehearing denied on March 31, 1951.

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7. That the Governor of Pennsylvania, by executive order, directed that the relator be removed from the Bucks County Prison to the Western State Penitentiary at Rockview, Center County, Pennsylvania, to carry out the sentence of death during the week beginning April 2, 1951, and later by special order of April 1, 1951, directed the warden of the Western State Penitentiary not to proceed with the execution of such judgment of sentence until April 4, 1951, so that a petition for a rule for reargument could be presented on April 2, 1951, to the Supreme Court of Pennsylvania on behalf of the relator.

8. That such petition was filed on April 2, 1951, with the Prothonotary of the Supreme Court of Pennsylvania, which was entered to No. 429, Miscellaneous Docket, No. 9, and the Supreme Court refused on April 3, 1951, to grant the prayer of such petition and issue the rule as requested.

9. That the relator is still confined in the Western State Penitentiary for the purpose of carrying out such sentence of death and under the special executive order of the Governor of April 1, 1951, will go to his death at 0001 a. m. on Wednesday, April 4, 1951.

10. That the relator is so restrained and confined under sentence of death unlawfully imposed in violation of the guarantees of a fair and impartial trial afforded by the Constitution and contrary to the due process clause and the Fourteenth Amendment to the United States Constitution.

11. That the relator did not have a fair and impartial trial as is contemplated and guaranteed by the Constitution, for the reason among others:

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That the relator was placed on trial at Doylestown on June 7, 1948, the week following the trial of the co-defendants, Harry Zeitz and Harold Foster, who were found guilty on June 4, 1948 of murder in the first degree and the penalty fixed at death. Zeitz was the one who actually fired the shot which killed William Kelly.

That upon the conviction by the jury of Zeitz and Foster, Judge Calvin S. Boyer, who presided at such trial, openly and publicly praised the jury for their verdict and the local newspaper, the "Doylestown Daily Intelligencer", carried on its first page an article which stated that:

"Judge Boyer praises the jury for verdict condemning two killers to electric chair. Court tells eight men and four women he could not see how any other course could have been taken—two defendants appear to be unmoved", and included therein an actual quotation attributed to Judge Boyer, which is as follows:

"I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days. The only hope of stemming the tide of such crime by youth is to impose the law which you have indicated by your decision."

That the hysteria and prejudice, which swept the town and County of Bucks, as the result of the Zeitz and Foster trial and verdict, was so general as to influence beyond a slight degree those jurors included in the panel from whom the jurors who actually tried the relator upon the charge of murder were selected.*

* Amendment allowed, March 16, 1954.

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Show Cause

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That nevertheless instead of postponing the relator's trial in the interest of a fair and impartial trial, until a later date when the relator could have been tried in an atmosphere of judicial calmness unaffected and uninfluenced by the developments in and the reactions of the immediately preceding trial of the relator's co-defendants, the relator was forced to go to trial on Monday, June 7, 1948, before Judge Hiram H. Keller and jurors, who had been drawn from a second panel and were familiar with what had transpired during the prior week in the Zeitz and Foster trial and the relator's connection therewith and the judge's utterances and the public and newspaper comments thereon.

That during the course of the relator's trial, Judge Boyer, who had presided at the Zeitz and Foster trial, and had publicly congratulated and commended the jurors on their verdict in that case, appeared at different times in the court room, where he could be plainly seen and observed by the jury trying the relator, and at times sat upon the bench and assisted and conferred with Judge Keller in the conduct of the trial of the relator and at other times elsewhere in the court room, but at all times the presence of Judge Boyer reminded the jurors serving in the relator's trial of the trial of Zeitz and Foster and the expressed commendation attitude of Judge Boyer toward that verdict.

That during the course of the trial of the relator, Judge Boyer on June 12, 1948, in sentencing to prison a young man from Philadelphia by the name of Robert White, age 18 years, who had pleaded guilty to stealing a car radio out of an automobile, said:

"We don't propose to nail all our property fast here in Bucks County just because thieves from Philadelphia want to pick up everything which isn't being watched. What business did you have to come up here in

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the first place? So far as your testimony is concerned, you have not shown any excuse here at all to come out of Philadelphia to Bucks County",

and such statement appeared as an actual quotation from Judge Boyer in the issue of the "Doylestown Daily Intelligencer" of June 12, 1948.

Judge Boyer had been on the Bucks County bench for a number of years, was well respected throughout the county, and his statements and actions would be definitely reflected in the jury box and would be prejudicial to their relations in having a fair and impartial trial.

12. That the relator did not have a fair and impartial trial as is contemplated and guaranteed by the Constitution for the reason among others:

That the relator was not permitted by his counsel to take the witness stand in his own defense and neither did his counsel produce any witnesses as to the background, personal history, mental condition, prior good behaviour, character and reputation of the relator.

That it was the duty of counsel for the relator to prepare the case of the relator and to make or caused to be made such investigations as may be necessary and thereupon to introduce all evidence and testimony, which would be helpful to the jury in determining the guilt or innocence of the relator and in fixing the punishment under the law.

That recently many reputable citizens have written letters, which are attached and collectively referred to as Exhibited A, indicating their opinion as to the good reputation of the relator prior to becoming involved with the three other co-defendants.

That when such letters, as well as other information, were

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shown to the jurors, who tried the relator and found him guilty of murder in the first degree with the death penalty, six of such jurors clearly indicated in letters that, had the relator taken the witness stand in his own defense or had his counsel produced evidence of good reputation, they would have fixed the penalty at life imprisonment instead of death.

That excerpts from the letters of such jurors, which are attached and referred to collectively as Exhibit B, are as follows:

(a) Letter of Ruth G. Bliss: "If I personally had the information about his reputation and character prior to this trial, which I have since become acquainted with, I would have voted for life imprisonment rather than the extreme penalty."

(b) Letter of Jesse H. Horne: "Had his life's record been revealed to me, I would have voted for life imprisonment."

(c) Letter of Ann L. Reed: "If I had heard the defendant's side of the story, I would have voted for life imprisonment."

(d) Letter of L. Calvin Fluck: "If I had had this information at the time of the trial, and could have had it revealed to me that his reputation prior to the time he became involved in his short career of crime, I would have voted for life imprisonment instead of the death penalty."

(e) Letter of Howard Price: "Had I known more about the defendant's background, I would have voted for life imprisonment."

(f) Letter of Anna W. Bucher: "My vote would have been for life imprisonment had I had any such knowledge of his good reputation prior to this trouble."

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That other of the jurors indicated in their letters, which are attached and referred to collectively as Exhibit C, as follows:

"There was only one conclusion we could come to when no defense was made and no character witnesses offered in that his character was so bad that it would not have helped in his case and that the lawyer who was fighting for his life would not have overlooked anything so important if there was anything to offer in the way of character and character witnesses." They also indicated that "having read letters from prominent people in the community," they believed "that the counsel for the defense erred, in not having character witnesses testifying in his behalf and thereby did did an injustice to David Darcy."

That counsel for the relator was not diligent in failing to introduce those witnesses, who would have testified as to the prior good reputation of the relator.

That since the trial of the relator, examinations have been made of the relator by Dr. A. Ornsteen, and Dr. Carl J. Hoffman, both of Philadelphia, and each has submitted a report thereof, which are attached and referred to collectively as Exhibit D. Dr. Ornsteen is a qualified, outstanding and well known psychiatrist, who states in his report that:

The relator is "a psychopathic personality type of individual; showing indications of being very easily swayed and persuaded to go along and act impulsively and without consideration of possible serious result to himself and others; that the numerous physical ailments in his early life topped by a year in bed and

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house confinement for a heart malady laid the ground-work for an inferiority feeling reaction which later required a superiority reaction compensation. This was very likely a strong part of the emotional drive which motivated his participation in crime.

That from the history of the relator's case as disclosed by the reports of Dr. Ornsteen and Dr. Hoffman, it appears that the relator had suffered head injuries and had become despondent because he was rejected by the Navy and later classified as 4F. It was the reasonable duty and obligation of counsel for the relator to have these and other essential facts investigated by a psychiatrist and if the results of such examination warranted it, then it was the further duty and obligation of counsel for the relator to have the psychiatrist to testify as to the results thereof before the court and jury, which testimony would have been helpful to the jury in passing upon the guilt or innocence of the relator and in fixing the penalty at death or life imprisonment. Counsel for the relator neglected to have the relator examined by a psychiatrist, and if the relator had been so examined, the psychiatrist would have testified, as Dr. Ornsteen reported, that the relator was easily led and a psychopathic personality.

13. That these facts, if the relator and other witnesses had been called to the witness stand by counsel for the relator, would have gone to and had a direct bearing upon the issue before the jury not only in determining the guilt or innocence but also in fixing the penalty.

14. That the relator is entitled to have a fair and impartial trial and also to have submitted to the jury all the facts

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and all the circumstances. The failure of counsel for the relator to present a defense in the behalf of the relator or to call character or other witnesses for him "offends against the fundamentals of a fair and impartial trial", according to the Supreme Court of Pennsylvania in the case of the Commonwealth v. O'Brien, reported in 312 Pa. State Reports, 543 (546).

15. That Earl D. Handy is the warden of the Bucks County Prison at Doylestown, Pennsylvania; Dr. John W. Claudy, the warden of the Western State Penitentiary at Rockview, Center County, Pennsylvania; and Carl H. Fleckenstine, the United States Marshall for the Middle District of Pennsylvania.

16. That the relator because of his present confinement to the Western State Penitentiary is unable to execute personally this petition and consequently the same has been executed by his counsel.

Wherefore, the relator contending that, under the allegations hereof, he is about to be put to death in violation of due process of law and the Fourteenth Amendment to the Constitution of the United States, prays:

(1) That a writ of habeas corpus be granted and awarded for the release of the relator from confinement pursuant to the judgment of death sentence, directed to Earl D. Handy, Warden of the Bucks County Prison, and Dr. John W. Claudy, Warden of the Western State Penitentiary, demanding them to have the body of the relator before your Honorable Court immediately, to do, submit to and receive what your Honorable Court may consider right, and likewise directing the said Earl D. Handy and Dr. John W. Claudy to make re-

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turn certifying specifically and fully the true cause of
commitment and detainer;

and

(2) That an order staying the execution of the death
penalty upon the relator and other proceedings there-
under be granted and awarded, until your Honorable
Court shall have acted upon and finally disposed of
this petition.

And he will ever pray.

DAVID DARCY,

Relator,

By: /s/ CHARLES J. MARGIOTTI,

/s/ MORTON WITKIN,

/s/ J. DRESS PANNELL,

Attorneys for Relator, David Darcy.

State of Pennsylvania {
County of Philadelphia { ss.

On this 3rd day of April, 1951, before me the subscriber, a
Notary Public in and for the said County and State, per-
sonally appeared Morton Witkin and J. Dress Pannell, who
being severally duly sworn according to law, each depose
and say: That the facts set forth in the foregoing petition
are true and correct so far as the same are based upon
personal knowledge; and so far as the same is based upon
information and belief, they believe them to be true and
correct.

/s/ MORTON WITKIN

/s/ J. DRESS PANNELL.

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Sworn to and subscribed before me, the day and year
first aforesaid.

/s/ MARIAN R. FORD,

(Seal)

Notary Public.

My Commission Expires Feb. 1st, 1953.

(2)

ANSWER OF JOHN W. CLAUDY, WARDEN OF WEST-
ERN STATE PENITENTIARY, TO PETITION FOR
WRIT OF HABEAS CORPUS.

TO THE HONORABLE, THE JUDGES OF THE SAID
COURT:

AND NOW, to wit, this 16th day of April, 1951, comes
John W. Claudy, Warden of Western State Penitentiary,
by Robert E. Woodside, Attorney General of Pennsylvania,
and answering said petition, nunc pro tunc, as of April 3,
1951, says:

1. Admitted.

2. It is admitted that the relator did not testify or intro-
duce any evidence in his defense on the trial of the indict-
ment. It is denied that his counsel, an able, skillful and
competent trial lawyer would, or did, coerce, or intimidate,
or prevent the relator from testifying or introducing any

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evidence in his behalf. On the contrary, it is averred that the trial strategy was not due to any lack of diligence or professional competency on the part of his counsel, but rather to a careful and well considered plan arrived at only after collaboration with other very able and competent trial counsel. It is further averred that said allegation is irrelevant, immaterial and not open to inquiry in this proceeding. *Deggs v. Welch* (U. S. C. A., D. C., 1945), 148 F. 2d 667; *Morton v. Welch* (C. C. A. 4, 1947), 162 F. 2d 840, 841; *Burkett v. Mayo* (C. C. A. 5, 1949), 173 F. 2d 574; *Andrew v. Robertson* (C. C. A. 5, 1944), 145 F. 2d 101, 102; *Jones v. Dowd* (C. C. A. 7, 1942), 128 F. 2d 331, 332; *United States, ex rel., Feeley v. Ragen* (C. C. A. 7, 1948), 166 F. 2d 976, 980-981; *United States, ex rel., Weber v. Ragen* (C. C. A. 7, 1949), 176 F. 2d 579, 586; *Sweet v. Howard* (C. C. A. 7, 1946), 155 F. 2d 715; *Miller v. Hudspeth* (C. C. A. 10, 1949), 176 F. 2d 111, 119-120; *Farrell v. Lanagan* (C. C. A. 1, 1948), 166 F. 2d 845, 847; *Tompsett v. State of Ohio* (C. C. A. 6, 1944), 146 F. 2d 95, 98; *Hudspeth v. McDonald* (C. C. A. 10, 1941), 120 F. 2d 962, 968; *Helms v. Humphrey* (D. C., Minn., 1945), 63 F. Supp. 4; *Ex parte Smith* (D. C. N. D., Pa. 1947), 72 F. Supp. 935, 940.

3. Admitted.

4. Admitted.

5. Admitted: See 338 U. S. 862.

6. Admitted. It is averred that said application for executive clemency; by necessity, admitted the validity of the judgment, now, for the first time, in this proceeding, claimed

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to be void for the reason specified notwithstanding that it was challenged in a habeas corpus proceeding in the Supreme Court of Pennsylvania, on other grounds and the Supreme Court of the United States denied certiorari to review the judgment of the Supreme Court of Pennsylvania denying a writ of habeas corpus (See 338 U. S. 862).

8. Admitted: It is averred, however, that said Petition for Reargument set forth substantially the same grounds alleged in this proceeding; that, had the Supreme Court of Pennsylvania been of opinion that there was any merit to the contentions; it, unquestionably, would have exercised its power, under the Acts of May 22, 1722 (1 Sm. Laws 140), and June 16, 1836, P. L. 785, "to minister justice to all persons" (See *Commonwealth v. Ragone*, 317 Pa. 113, 126-128, 176 Atl. 454 (1935)) and treated it as a petition for a writ of habeas corpus; that, since the Supreme Court of Pennsylvania refused the petition, the only deducible inference is that it felt that there was no merit to it.

9. Admitted. It is further averred that on April 3, 1951, execution of the sentence was stayed pursuant to the order of your Honorable Court, pending the determination of this proceeding; that on April 11, 1951, your Honorable Court dismissed the petition and refused a further stay of execution; that on the same day, to wit, April 11, 1951, the United States Court of Appeals for the Third Circuit granted the relator leave to appeal from the order of your Honorable Court dismissing the petition; and issued a stay of execution pending disposition of said appeal.

10. Denied. On the contrary it is averred that the relator was not denied due process of law in contravention of the

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Fourteenth Amendment of the Constitution of the United States in the proceeding eventuating in the judgment and sentence of death.

11. It is denied that the relator was denied a fair and impartial trial in contravention of the Fourteenth Amendment of the Constitution of the United States.

It is admitted that the relator was placed on trial following the conviction of his co-defendants of murder in the first degree, with the penalty fixed at death.

The respondent has no knowledge of the truth or falsity of the allegation with respect to the alleged remarks of Judge Calvin S. Boyer to the jury which tried the relator's co-defendants following the rendition of its verdict and the alleged publication thereof in the "Doylestown Daily Intelligencer" and, therefore, neither admits nor denies the same, but, if material and relevant, demands proof thereof at the trial. It is averred, however, that said allegation is irrelevant, immaterial and not open to inquiry in this proceeding, since it could and should have been raised in the appeal from the conviction or, at the very least, in the prior application for a writ of habeas corpus.

It is denied that as a result of the verdict in the trial of relator's co-defendants hysteria and prejudice was so general as to influence the jurors included in the panel from which the jury who tried the relator on the indictment in the Court of Oyer and Terminer of Bucks County at No. 37 February Term, 1949, from rendering a verdict other than on the evidence and the law. On the contrary, it is averred, that the voir dire examination of the jurors who were selected to try the relator on said indictment which this court not only has a right, but also a duty to examine

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(*Dorsey v. Gill* (U. S. C. A., D. C., 1945), 148 F. 2d 857, 870), clearly indicates that they, the jurors, selected were not prejudiced or influenced by the trial of the relator's co-defendants, or by any matter connected therewith, and could reach a verdict solely on the basis of the evidence and the law applicable thereto. It is further averred that the relator, who was represented at his trial by an able, skillful and competent trial lawyer (See the Charge of the Trial Court and the Opinion of the Supreme Court of Pennsylvania, Commonwealth, ex rel., *Darcy v. Claudy* (Exhibit A)), made no application either to the trial court or the Supreme Court of Pennsylvania for a change of venue. It is averred that said allegation is irrelevant, immaterial and not open to inquiry in this proceeding. Cf. *Wallace v. United States* (C. C. A. 8, 1949), 174 F. 2d 112; *Bard v. Chilton* (C. C. A. 6, 1927), 20 F. 2d 906; *United States, ex rel., Buckhalter v. Lowenthal* (C. C. A. 2, 1940), 108 F. 2d 863; *United States, ex rel., Bongiorno v. Ragen* (C. C. A. 7, 1945), 146 F. 2d 349, 352.

It is admitted that the relator's trial was not postponed. It is averred, however, that no application for a postponement was made to the trial court, and that there was no reason whatever, as indicated by the voir dire examination of the jurors selected to try the relator, why the trial court should have made such an order sua sponte. It is denied that the jurors who were selected to try the relator were familiar with the trial of the relator's co-defendants, the court's alleged utterances to that jury, or the alleged newspaper comments thereon. It is averred that the voir dire examination of the jurors conclusively rebut the said allegation. It is further averred that said allegation is irrelevant, immaterial and is not open to inquiry in this proceeding.

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It is admitted that Judge Calvin S. Boyer, who presided at the trial of the relator's co-defendants, on one occasion, set on the bench with President Judge Keller, who was presiding at the trial of the relator. It is averred, however, that said allegation is immaterial, irrelevant and not open to inquiry in this proceeding since it was a matter of record and not only could, but also should have been presented, if it were felt that it constituted error, in the appeal, from the conviction, to the Supreme Court. *Sanderlin v. Smyth* (C. C. A. 4, 1943), 138 F. 2d 729; *United States, ex rel., Jackson, et al. v. Brady* (C. C. A. 4, 1943), 133 F. 2d 476. The respondent has no knowledge of the number of occasions on which Judge Boyer may have entered the court room during the trial of the relator, or the effect of his presence therein on the jury trying the relator, and, therefore, neither admits nor denies the allegation with respect thereto, but, if deemed material and relevant, demands proof thereof at the trial of cause. It is averred, however, that Judge Boyer's presence in the court room during the trial of the relator was neither irregular nor improper and, in no sense of the word, operated to deny the relator due process of law in contravention of the Fourteenth Amendment of the Constitution of the United States, in his trial.

The respondent has no knowledge of the truth or falsity of the remarks attributed to Judge Boyer in pronouncing sentence upon a defendant in a wholly unrelated proceeding and, therefore, neither admits nor denies the same, but, if deemed relevant and material, demands proof thereof at the trial of the cause. It is averred, however, that said allegation is irrelevant, immaterial and is not open to inquiry in this proceeding.

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12. Denied. On the contrary, it is averred that the relator was not denied any constitutional right on the trial of the indictment eventuating in the judgment and sentence of death. It is further averred that said allegation is irrelevant, immaterial, and not open to inquiry in this proceeding. See paragraph 2 of this Answer which is incorporated by reference herein; *Rakes v. United States* (C. C. A. 4, 1948), 169 F. 2d 739.

13. The respondent has no knowledge of the truth or falsity of this allegation, and neither admits nor denies the same, but, if deemed material and relevant, demands proof thereof at the trial of the cause. It is averred that said allegation is irrelevant, immaterial and not open to inquiry in this proceeding.

14. Denied, as averred. It is admitted that the Fourteenth Amendment of the Constitution of the United States forbids the several states from *denying* an accused his right to a fair and impartial trial. It is averred, however, that there is a vast distinction between *denial*—affirmative action by the state—and *failure to enjoy*, which does not invalidate the judgment (*Dorsey v. Gill*, *supra*; *Burkett v. Mayo*, *supra*; *Hudspeth v. McDonald*, *supra*; *Miller v. Hudspeth*, *supra*, and *Farrell v. Lanagan*, *supra*). It is averred that the said allegation is irrelevant, immaterial and not open to inquiry in this proceeding.

15. Admitted.

16. Denied. It is averred, however, that had relator's counsel seasonably presented, as it was their duty to do,

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the petition to the officials at the Western State Penitentiary, Rockview, it would have been promptly presented to the relator for his execution and just as promptly returned to his counsel.

NEW MATTER.

Further answering the relator's petition, the respondent alleges the following new material.

17. On April 4, 1951, the Supreme Court of Pennsylvania, denied the relator's Petition for a Writ of Habeas Corpus, predicated on substantially the same grounds alleged in this proceeding, a true and correct copy of the Opinion of said Court being attached hereto, made a part hereof and marked "Exhibit A".

WHEREFORE, the respondent prays your Honorable Court to discharge the rule to show cause and dismiss the Petition for a Writ of Habeas Corpus. And he will ever pray, etc.

/s/ ROBERT E. WOODSIDE,
Attorney General of Pennsylvania.

By /s/ RANDOLPH C. RYDER,
Deputy Attorney General of Pennsylvania.

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Commonwealth of Pennsylvania }
County of Dauphin } ss.

Before me, a Notary Public in and for said State and
County, personally appeared RANDOLPH C. RYDER,
Deputy Attorney General of Pennsylvania, who being duly
sworn according to law, deposes and says that the fore-
going facts are true and correct to the best of his knowl-
edge, information and belief.

/s/ RANDOLPH C. RYDER,

Deputy Attorney General
of Pennsylvania.

Sworn and subscribed to before me this 16th day of April,
1951.

/s/ LUCILLE A. STROUP,

Notary Public.

My Commission Expires:

Testimony

III.

TRANSCRIPT OF HEARING UPON PETITION.

(1)

TESTIMONY.

Before:

HONORABLE ALBERT L. WATSON
and HONORABLE JOHN W. MURPHY,
United States District Judges.

Seranton, Pa., March 11, 12, 13, 16, 17, 18, 19, 20, 1954.

APPEARANCES:

For the Relator:

CHARLES J. MARGIOTTI, Esq.

Pittsburgh, Pa.;

J. DRESS PANNELL, Esq.

Harrisburg, Pa.

For the Respondents:

RANDOLPH RYDER, Esq.

Assistant Attorney General

Harrisburg, Pa.;

FRANK P. LAWLEY, Esq.

Deputy Attorney General

Harrisburg, Pa.;

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DONALD W. VANARTSDALEN, Esq.

District Attorney

Doylestown, Pa.;

J. JULIUS LEVY, Esq.,

United States Attorney

Scranton, Pa.

(3) BY JUDGE MURPHY: Gentlemen, as we understand it, there is first the problem of a motion by the Commonwealth.

BY MR. RYDER: Yes sir. In answer to the Court's statement, the Commonwealth presented a motion to discharge the rule to show cause.

May I suggest at this time that the Court inquire whether or not the Relator, David Darcy, is in the courtroom. He was ordered produced.

BY JUDGE MURPHY: Let me make the observation that the Relator, David Darcy, is in the courtroom, that he is sitting in the rear of his counsel, Charles J. Margiotti and J. Dress Pannel and the other gentleman —

BY MR. MARGIOTTI: He is an investigator, Judge.

BY JUDGE MURPHY: Now let me make one other inquiry: As we understand it, gentlemen, there are two problems: One, there has been a Petition for a Writ of Habeas Corpus. That matter was before the Court on a previous occasion. It was later before the Court of Appeals. The Court of Appeals has sent down a Mandate and we have before us the Mandate of the Court of Appeals, and in the normal course of events the first order of business would be to proceed to carry

Argument of Counsel

out the Mandate and to inquire whether or not a Writ of Habeas Corpus should be granted. But in the meantime the State of Pennsylvania has announced and presented to the Court that they would like to move to discharge the rule to show cause. So that it is the judgment of the Court that (4) we should first dispose of the motion before we proceed to the carrying out of the Mandate.

Do the counsel for the Relator have any objection to that procedure?

BY MR. MARGIOTTI: We have an objection to a consideration at this time, Your Honor, for the reason that the first intimation I had that this motion was going to be presented came in the form of a letter from Mr. Ryder—the letter is dated, I believe, March 4, 1954—and which letter was received in my office either on March 5 or 6. There is no stamp from my office indicating when it was received. But the letter itself is dated March 4, and the letter states:

"I am enclosing herewith copy of Motion to Discharge Rule to Show Cause which will be presented to the Court, on Thursday, March 11, 1954, at 10:00 A.M."

And there was a copy of their motion:

"I am sorry that I am unable to serve a copy of our brief upon you at this time, but hope to have the same in your possession by Monday. Since the Motion is predicated largely upon points presented in the Court of Appeals in *Elliott v. Baldi*, which was argued on December 22, 1953, I am enclosing a copy of that brief."

And, as I understand that case was argued before the Circuit Court in Philadelphia by Mr. Ryder, and they sent me a copy of that brief, not a copy of a brief in this case but a copy of a brief they used in this *Elliott* case.

"However, I want to emphasize that our brief in the (5) District Court will not only be a rearrangement of the material

Argument of Counsel

there presented, but also include additional material."

Now I hurriedly looked over this brief, the motion, and I didn't know what points were going to be stressed. I wasn't furnished with a brief by counsel for the Commonwealth. Yesterday at noon when I called my office from Hershey they told me there was a brief there from Mr. Ryder. So last evening I saw Mr. Ryder at the Casey Hotel and told him, "I was told there was some sort of motion as to a matter of law I heard you sent to the office." He said, "That is a copy of our brief. You haven't had that?" I said "No, it reached the office today." Last night about 10:00 o'clock or thereabouts I was served with a copy of a brief containing a number of pages—

BY JUDGE MURPHY: Seventy-five.

BY MR. MARGIOTTI: Very frankly I didn't have time to read it at that time because I was preparing the testimony to be produced before this Court.

BY JUDGE MURPHY: Was there a substantial question raised—let me change the wording. Was the question that is now before the Court in the motion to dismiss discussed at all in the Petition for Certiorari of the Commonwealth from the decision of the Court of Appeals?

BY MR. MARGIOTTI: (6) In my opinion, there was an adjudication of the very matter.

BY JUDGE MURPHY: So that counsel for the Relator was familiar with the matter as it was presented in the Petition for Certiorari.

BY MR. MARGIOTTI: Generally so.

Argument of Counsel

BY JUDGE MURPHY: You say it has already been determined?

BY MR. MARGIOTTI: I think there was an adjudication because in the Petition for Certiorari—I have a copy here, Your Honor—they cited 117 cases —

BY JUDGE MURPHY: Now, which position do you take? Do you say you are not familiar with it or that it is already adjudicated?

BY MR. MARGIOTTI: I take both.

BY JUDGE MURPHY: Then you object to proceeding at this time with the motion.

BY MR. MARGIOTTI: On the ground they can't proceed on this basis: Your Honor came all the way to Harrisburg, I understand, and Judge Pannell was there, for the purpose of determining when everybody was going to be ready to hear this case. At that time Mr. Ryder said he was ready at any time and he didn't give any indication he was going to present such a motion. I don't know when the Court first found out he was going to present such a motion —

(7) BY JUDGE MURPHY: At any rate, you object to the consideration of the motion of this time.

BY MR. MARGIOTTI: I do.

BY JUDGE MURPHY: The objection is overruled. Proceed with the motion.

BY MR. RYDER: First of all, I am extremely regretful

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that we were unable to place this brief in the hands of the Court until yesterday or in the hands of my learned adversary until last night.

Mr. Margiotti now knows how I felt nearly three years ago—just shy a few days—when I was forced to appear in this Court and answer a rule to show cause why a writ of habeas corpus should not issue. That rule, as Your Honor will recall, was served on me only less than twenty-four hours before its return hour here in this Court.

I do not, however, wish to take advantage of my learned adversary.

This is an important case. We raise what we contend to be most important issues, and we feel that they are basic, fundamental, they are jurisdictional, and we would like to have this Court give them its thorough consideration.

This matter, Your Honor, is a serious national problem. Some of the issues which have been raised in this motion were presented in the Circuit Court of Appeals in *Elliott v. Baldi*, argued before the full bench of the Court of Appeals on December 22, 1953, now awaiting decision by that Court, in which the Attorneys General to date of forty states of the (8) Nation have joined with Pennsylvania.

This is not a local problem; it is nation-wide. For that reason we have felt that we should raise these issues here in this Court so that we could have the advantage of this Court's views.

Now, first of all, here I think probably I ought to state this Court is not precluded from considering the issues which we have raised here. They were not raised in the Court of Appeals, most of them.

The Commonwealth in the presentation of the case in the Court of Appeals relied upon two very obvious legal points upon which we felt the case ought to be decided, namely, one, the denial of the Certiorari by the Supreme Court of the United

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States should be given conclusive and controlling effect; two, that there was adequate evidence in the record of the prior proceeding which would support the conclusions and findings of this Court.

At the time of the reargument before the Court of Appeals the question of the conclusiveness of the denial of Certiorari had not been decided by the Supreme Court of the United States in the cases involving Brown, Rosenberg and Daniels, all of which, I believe, had been argued before the Supreme Court of the United States and were reargued the latter part of September. This case was set down for reargument the first part of December. Brown was decided sometime in February. This case was decided by the Circuit Court of Appeals on March 24, 1953.

In the application for Certiorari to the Supreme Court of the United States we did raise one point in that application, and that is Point No. 1 in this motion, and that is, in effect, that this is a suit against the State of Pennsylvania to which the State of Pennsylvania has not consented and is enjoined (9) by the Eleventh Amendment to the Constitution. True, the Supreme Court of the United States denied Certiorari, but I don't think that denial should be construed adversely to the Commonwealth —

BY JUDGE MURPHY: Let me ask you one thing. The language of the Eleventh Amendment doesn't cover your situation, does it?

BY MR. RYDER: I think it does.

BY JUDGE MURPHY: Let me read it to you.

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State or Subjects of any Foreign State."

Is there anything in the Amendment that says that a citizen of one state cannot sue his own state?

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: Not in the wording.

BY MR. RYDER: Not in the wording.

BY JUDGE MURPHY: You don't discuss that question in your brief.

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: Whereabouts?
You go ahead.

(10) BY MR. RYDER: The very point which Your Honor raised was decided in the Supreme Court in the case of *Hans v. Louisiana*, 134 U. S. 1, and in the case of *North Carolina v. Temple*, 134 U. S. 22.

BY JUDGE MURPHY: They are in your brief?

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: Page 13?

BY MR. RYDER: Page 13, the opening paragraph.

BY JUDGE MURPHY: I see. "... by a resident thereof."

BY MR. RYDER: Yes.

With respect to the effect of the Certiorari and Certiorari application, I said I didn't think that had any legal significance.

Argument of Counsel

so far as Point No. 1 was concerned, for these two reasons: First of all, we were attempting to induce the Supreme Court to review a judgment which was not final. We knew that. We thought there was a question of jurisdiction involved and probably we could terminate the litigation at that point. We took the chance and were not successful. Second, it was not raised in the Court of Appeals; it was not raised in the District Court. Therefore, the Supreme Court of the United States refused to review for that reason.

Now turning to Point No. 1—I am going to split my argument on Point No. 1—I have already stated the proposition. I will try to be very brief on it. I have already pointed out (11) the Eleventh Amendment comprehends actions by a resident of a state against a particular state. Now it comprehends not only suits brought against a state by name, but those also against its officers, agents, and representatives, though not named as such, where the state, though not named as such, is nevertheless the real party in interest.

Now the obvious purpose of this proceeding is a substantial reversal of a criminal judgment. That was stated by Mr. Justice Marshall, as I recall, in *Ex Parte Watkins*. It is a direct attack upon the validity of the criminal judgment forming the basis of detention. That judgment was secured in a proceeding by and in the name of the State of Pennsylvania and against the particular defendant—the said judgment which the applicant is seeking to reverse in this Court.

True, the applicant is in the custody of the Warden of the State Penitentiary at Rockview—and may I call to Your Honor's attention the fact at this time that the name of the institution at which the applicant is now confined, and which he has been confined, has been changed by legislation of the Commonwealth of Pennsylvania from Western State Penitentiary to the State Penitentiary at Rockview, and the acting Warden of the State Penitentiary at Rockview, or the Warden

rather, is no longer the man specified in the application, Dr. John W. Claudy, but Dr. Fred S. Baldi.

The Warden of the institution has no interest in this judgment. He has no liability to anybody for the detention pursuant to the judgment. And if an order is obtained from this Court that is the objective of this proceeding—discharge, that order can only apply upon the custodian, by reason of his (12) official representation of the State. It, therefore, can't be claimed that it is a suit against the custodian. But it is, in sum and substance, against the State.

Now, this is the pay-off,—faking the application itself, it is predicated on the Fourteenth Amendment. The Fourteenth Amendment does not run against individual action; it runs against State action.

Now then, if it isn't a suit against the State—within the provisions of the Eleventh Amendment, then certainly he has not made out a case under the Fourteenth Amendment.

Now then, the next question is this: Is the suit "in law or equity" within the Eleventh Amendment? The simple answer to that is if it is not a suit "in law or equity" within the Eleventh Amendment, then this Court does not have the judicial power to entertain this application because the sole source of its constitutional power, which authorizes or empowers this Court to entertain all cases "in law and equity," is a clause in the Judiciary Article of the Constitution which provides: "The judicial power shall extend to all cases in law and equity arising under this Constitution . . ."

Now if it is a case "in law and equity" under the Judiciary Article, certainly it is a case "in law and equity" under the Eleventh Amendment.

Now then, has the State of Pennsylvania consented to this suit? The Supreme Court of the United States has said that the consent may only come from the State itself, that it can not come from the Constitution or laws of the United States.

Argument of Counsel

There is not a statute in Pennsylvania which can be or may be interpreted as authorizing our consent to suit in (13) any Federal Court exercising jurisdiction in Pennsylvania. There is no statute in Pennsylvania which would authorize the Attorney General of the State to consent to such a suit, and his common law powers, as established by the Supreme Court of Pennsylvania, I believe, in a litigation in which my learned adversary himself was counsel, do not comprehend such authority.

So I say to you that this case is clearly a suit against the Commonwealth of Pennsylvania to which it has not consented and which is comprehended by the Eleventh Amendment:

Now that takes me to the next point which I have raised in our brief, namely, if this is not construed as a suit against the State of Pennsylvania, then, by necessity, it must be construed as an exercise of appellate revisory power. In other words, it is a suit against the individual warden of the institution. The objective is the reversal of the judgment pursuant to which he is being held. And, by necessity, this Court is being asked to exercise a revisory jurisdiction.

The writ of habeas corpus has been characterized in several of the opinions of the Supreme Court as the exercise of revisory jurisdiction or an appellate jurisdiction.

As part of the prior processes which the applicant is required to exhaust before he can seek his relief under the Statute, Sections 2241, 2254, Revised Judicial Code, he must go to the Supreme Court of the United States on Certiorari.

Now we are mindful of the pronouncements of the United States Supreme Court in *Brown* and other cases that denial of Certiorari means absolutely nothing on the merits. We are very mindful of them because we were there in the Supreme Court of the United States at the time those cases were argued (14) and we argued to the contrary.

I am submitting to you, gentlemen, that there is a vast dis-

junction between determination on the merits and determination on other grounds. And it is only on reflection and view of the arguments which I heard made before the Supreme Court of the United States, which I myself made in *Smith v. Baldi*, the exchange of colloquy between counsel and members of the bench, that it finally dawned upon me the significance of that phraseology "has no legal significance on the merits."

As a condition precedent to getting into the Supreme Court of the United States according to their rules, Rules 12 and 38, it is necessary for the applicant to state a case involving a "federal question of substance." That is one of the vital essentials. If he does not lay that down, the Court does not have jurisdiction, and they are not going to examine the record necessarily to see whether or not that question does exist unless he sets it forth plainly.

Rules 12, 38(5)—the only natural inference from that is, as I read and study the two rules—is that when the Supreme Court denies *Certiorari* it can mean one of three possible things. No. 1, that it does not appear upon the face of the record that a substantial federal question is involved. Now that matter is jurisdictional in every United States Court—in every United States Court. It has got to appear upon the face of the record, otherwise this Court does not have jurisdiction. No. 2, possibly that application does not comply with the Rules of Court, some technical requirement.

I can't conceive that the Congress of the United States would require an applicant for relief in the Federal Court to go down to the Supreme Court of the United States on *Certiorari* (15) from denial of relief by the State court and yet simply merely require that there be merely pretense, just going through the motions, without complying with the Rules of Court.

Now then, if the denial is predicated on that ground, they have not exhausted their State remedies because that application has been construed by the Supreme Court in *Darr v. Bur-*

Argument of Counsel

ford and Brown v. Allen as being an essential part of the exhaustion of state remedies, and that is a jurisdictional bar. That was decided in *Darr*. If that is not done, this Court does not have jurisdiction —

BY JUDGE MURPHY: That case said, in effect, you come up and allege a certain thing in compliance with the Rule and in order to have us entertain it you have to have the number of Justices favor as a requisite. It used to be four. Is it four now?

BY MR. RYDER: Yes.

BY JUDGE MURPHY: Unless you get four you don't get it. The denial of *Certiorari* means no more than that.

BY MR. RYDER: I think it does —

BY JUDGE MURPHY: Isn't that what you have said?

BY MR. RYDER: I am coming to that point. I have a few things I want to bring to this Court's attention with respect to that —

BY JUDGE MURPHY: I would say no matter how you put it—three thought you (16) had substantial—it may mean that three of the Justices, certainly after a perusal of the papers and a study of them, may have felt there was considerable merit —

BY MR. RYDER: That is right.

BY JUDGE MURPHY: —but if you can't get one more, back you go.

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Argument of Counsel

BY MR. RYDER: That is right.

BY JUDGE MURPHY: All right, go ahead.

BY MR. RYDER: Now since Your Honor has raised that point, I can't conceive, especially in a capital case—and I believe I made this observation to the Supreme Court of the United States—I can't conceive—we find it most difficult to conceive—as a matter of fact, it is almost incredible—in the face of the language which was expressed or used by the Supreme Court of the United States to the effect that in a capital case they give the most serious consideration to every question of fact and law, and since there are decisions with the opinion—and they are referring to denial of Certiorari—that it must be predicated upon some legal ground.

Now Mr. Justice Frankfurter ———

BY JUDGE MURPHY: If there are nine members of the Supreme Court—and according to the Halliburton letters at least—the Certiorari papers are distributed to each member of the Court, that is Petition for Certiorari, and if it is distributed to all nine and they read them and study them, as we feel they do—quite (17) certain they do—then if there is not a granting of the Writ of Certiorari, is it equivalent to a finding, in effect, that six out of nine feel there is no merit or not sufficient merit to get into that Court?

BY MR. RYDER: I wouldn't say yes to that statement. I would like to say so ———

BY JUDGE MURPHY: It may not mean an affirmative finding, but it means six of them refused to make an affirmative finding by placing approval on granting of the Writ for various reasons, however. It may be one of a half-dozen, apart from the merits.

Argument of Counsel

BY MR. RYDER: Apart from the merits.

I was going to say I would like to agree with Your Honor's statement it was an implied finding on the merits —

BY JUDGE MURPHY: It may be. It could be one of four or five things.

BY MR. RYDER: Faced with a definite rule of law it is not a ruling on the merits. I am suggesting it may be a ruling, in effect, that the application didn't set forth a substantial federal question—jurisdictional. Possibly they didn't comply with the Rules of Court. Now that is a part of the exhaustion of State remedies. If they didn't, I don't see how they can possibly come into Court and say they have exhausted their State remedies. I don't believe Congress would require them to go down to the Supreme Court just to go through the motions (18) of sending a paper down there, regardless of whether or not it complied with the Rules, it could hold there was exhaustion of State remedies. I can't conceive it.

There is one other part that I can't conceive and that is that one was not "ripe" for a determination of the particular matters in the Petition, assuming they complied with the Rules of Court and it did present a substantial federal question.

When an application is made back to this Court on the basis of that record, that is the record upon which the Court has got to act upon the rule.

Footnote 19, *Brown v. Allen*, it is the record in the prior proceedings in the State court before coming to this Court upon which this Court must act.

Now then, when that record comes into this Court, aren't they asking you to do one of three things; and each one of those three things—if you did anyone of those three things, you are really exercising revisory jurisdiction over the Supreme Court of the United States.

Argument of Counsel

First, they have got to aver on the face of the record or application in order for this Court to have jurisdiction there is a substantial federal question involved. You have the implied finding, possible implied finding—rendered on the denial of the Certiorari, or the result of the denial of Certiorari, by the Supreme Court of the United States that that record does not present a substantial federal question. If that is true, then this Court does not have jurisdiction. (19) And if you go ahead and entertain the application in the face of that, aren't you then exercising a revisory jurisdiction over the Supreme Court?

Second, suppose the denial is predicated upon the proposition that it did not comply with the Rules of Court. Now before they can get into this Court they have got to exhaust their State remedies, and resort to that Court is part of it. If you entertain the application on the ground they have exhausted their State remedies, and let's assume the Supreme Court did predicate denial on that ground, aren't you exercising a revisory jurisdiction over the Supreme Court of the United States?

Third, assuming the other two points were answered in the affirmative, jurisdiction, compliance with the Rules of Court, but they decided that the time is not "ripe." Now if you entertain this application and proceed to adjudicate on the ground the time is ripe, aren't you exercising a revisory jurisdiction over the Supreme Court?

Now the Judiciary Article of the Constitution comprehends there shall be one Supreme Court. There is no doubt about that. There shall be one Supreme Court. It has no superior. That Court has no superior in the Federal judicial hierarchy. That is the paramount tribunal of the Nation.

Now we are aware of the fact that the Supreme Court has said—and I have pointed that out in my brief, incidentally—we are aware of the fact the Supreme Court has ~~and~~ notwithstanding

Argument of Counsel

standing that Court has denied Certiorari or refusal of relief by State courts or even after affirmance, the Federal District Courts may under the Writ of Habeas Corpus inquire, nevertheless, (20) into the criminal judgment. I am aware of that fact. I have admitted it in my brief. But I submit for the consideration of Your Honors that what you are, in effect, doing by entertaining this application is to exercise a revisory jurisdiction over the Supreme Court.

Now then, if the Supreme Court says that is all right; that is all right with us. But what we are objecting to—and I say this most respectfully and I trust Your Honors will realize it is rather difficult for me to make this argument to this Court—and at the inception I want to state that the Commonwealth of Pennsylvania, Department of Justice, Attorney-General's office, has the highest regard for our Federal Judicial System. I made that statement before the Judges from all over the United States, and I will reassert it here. We do. It is not the judicial system, necessarily. It is not the judges. It is the system which has been established by the application of this power to issue Writs of Habeas Corpus to State prisoners that we are attacking.

Now, as I have said before, the Constitution provides for one Supreme Court. There was a definite reason for that. As I recall, Alexander Hamilton writing in *The Federalist*—Mr. Chief Justice Marshall in *Cohens v. Virginia*: The reason for that was this: It was necessary to have one Supreme Court tribunal which would consistently and uniformly expound the laws of the Constitution of the United States. Mr. Hamilton writing in *The Federalist* put it in a little bit different vein. He said the purpose of it was to eliminate a "hydra in government from which nothing but contradiction and confusion can proceed if the state courts of the thirteen original states were left to themselves to determine what the Constitution (21) meant."

Argument of Counsel

Now let me just analyze, if I may, the situation that we have to confront with now. In Pennsylvania the law provides for fifteen Federal District Judges. We have a seven judge Court of Appeals. Now if a single Federal District Court Judge has the power under his authority to issue a Writ of Habeas Corpus on the application of a State prisoner, we have, in effect, in Pennsylvania—and I say this most respectfully—fifteen appellate revisory courts exercising the jurisdiction over our highest State court.

Now, on the next level in the Court of Appeals—and this is incredible, and I believe the Court of Appeals found it incredible in the course of my argument in *Elliott v. Baldi*—out of a seven judge membership who sit in three judge panels, it is possible to have thirty-five different three judge combinations.

Now on a National level, Your Honor, I believe that we have 218 Federal District Judges, and using the possible combinations within those, not overlapping within those, we would have 131 three judge appellate revisory courts exercising jurisdiction over the 218 appellate revisory courts, that is single judge appellate revisory courts. That is a total of 349 appellate revisory courts in the United States exercising jurisdiction over the forty-eight state courts. And the purpose of the creation of the Supreme Court was to eliminate thirteen added hydras. Instead of thirteen added hydras, we now have, if this system is constitutionally authorized—we have 349 added hydras.

Now, what does that mean in Pennsylvania alone in the administration of our criminal justice? It means this, as I analyze it, when a problem involving a right secured by the (22) Federal Constitution arises during the course of a trial in the State court, what rule of law is that State court going to adopt in disposing of that application? Is it going to use the rule which has been laid down by the District Court, the Fed-

eral District Judge, in the area of the trial? Is it going to use the rule which has been laid down by the District Court, the Federal District Judge, in the area of confinement? Suppose it has been decided in one area one way. Suppose it has not been decided in the other. Which rule is it going to follow?

Now then, assuming it has not been decided in Pennsylvania at all. Where is it going for its law? Is it going down to the Southern District of Louisiana, the Northern District of Oregon, the Eastern District of Massachusetts? Suppose there is a conflict. Which one is it going to accept? And suppose it accepts one that is not acceptable in the District where it subsequently comes up on Habeas Corpus.

Now then, we have this additional problem, there might be a split. There frequently is a split in the three Judges of the Court of Appeals. There was here in this very case. If we had been before a three judge division composed of men voting in our favor, we would have won this case and we wouldn't be here; or if we had in the second three of whom were composed of men voting in our favor, we wouldn't be here. It is possible to have conflicts, as I have illustrated, between panels in the same circuit. Who is going to resolve those, and where are we going for our choice of law? We don't know.

(23) Now then, with respect to the Constitution itself, we take the position that the Constitution—the Framers of the Constitution comprehended there should be one Supreme Court, exercising revisory jurisdiction over the State courts.

For several years after the adoption of the Constitution there was very strong contention between the State of Virginia and the Federal Government, and other states, that the power of the Supreme Court did not extend to revisory jurisdiction over the civil judgment of the State courts. That was finally decided in *Martin v. Hunter* in 1807, as I recall, and it wasn't until *Cohens*, some ten years later, it was decided by the Supreme Court they had power to review a state criminal judgment.

Argument of Counsel

Now that case has been cited for that proposition. The Cohens case has been cited for that proposition here. If Your Honors read it, I cannot conceive—and I have read it—you will see it is really not a criminal proceeding but a quasi-criminal proceeding for the recovery of a penalty. But, nevertheless, Cohens v. Virginia has been cited for that particular proposition that is in the law.

BY JUDGE MURPHY: Let me make one suggestion. You are probably going to take some time. You quoted from Hamilton in No. 80. Are you familiar with Hamilton in No. 82, this paragraph:

"But could an appeal be made to lie from the State courts to the subordinate federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations (24), countenance the affirmative: The plan of the convention, in the first place, authorizes the national legislature 'to constitute tribunals inferior to the Supreme Court.' It declares, in the next place, that 'the Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall ordain and establish'; and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the Supreme Court into original and appellate, but gives no definition of that of the subordinate courts . . . ?"

BY MR. RYDER: I am acquainted with that proposition. I didn't set it forth in my brief. It slipped my mind.

I was just coming to this point: I want to call Your Honors' attention—I point it out in my brief—I realize that there is dicta against this position I am asserting. For instance, Mr. Justice Story in *Martin v. Hunter*, you will find that I have pointed that out on Pages 40 and 41 of the brief—said that

Argument of Counsel

appellate federal jurisdictional power can be divided by Congress any way they want to divide it except it couldn't take away Supreme Court original jurisdiction.

Mr. Justice Frankfurter in *Brown v. Allen*—I feel this was in answer to the complicated argument I made in *Smith v. Baldi*—said virtually the same thing, and I have pointed that out in my brief.

We have the highest regard for both of those gentlemen, but I am wondering whether or not—I am calling it to your (25) attention whether or not they really gave due and proper consideration before they pronounced those statements to the actual formation of the Constitution itself.

If you turn to Pages 41 and 42 of our brief—I have pointed out when the document was in the Committee of Style there was a provision in there which would have prescribed just that, empower Congress to divide up the jurisdictional power of the United States any way it saw fit. But when the main draft came out of the Committee of Detail—I believe it was the Committee of Detail; maybe I have got them inverted—anyway, when that came out that clause was deleted. Only one inference you can draw from that—incidentally, Mr. Hamilton was a member of the final Committee. That Committee was composed of Messrs. Johnson, Hamilton, Morris, Madison, and King. I have pointed that out on Page 42. So the only inference you can draw from that elimination is that Congress or the Framers didn't intend to authorize Congress to divide up the jurisdictional power any way they saw fit. There was to be only one court. That was the Supreme Court.

There is further evidence of that intention, and that is the Judiciary Act of 1789. That Act was drafted by Oliver Ellsworth, who later became Chief Justice of the Supreme Court.

If you will refer to the concluding paragraph of that brief, you will find that statement made by Mr. Ellsworth.

That great Act was penned by Mr. Ellsworth, a member of

the convention which framed the Constitution, and one of the early chief justices of the Supreme Court. It may be said to reflect the views of the founders of the Republic as to the proper relations between the Federal and State courts.

(26) Now then, there was no provision made in the Act of 1789 for any Federal court to exercise any revisory jurisdiction over a State court except the Supreme Court. True, there was power of removal from State courts to Federal courts, but they were exercising an original jurisdiction there, not a revisory jurisdiction.

Now, as a practical matter, I have already pointed out the practical ramifications of the exercise of this jurisdiction. Probably—I know the Court in passing upon the constitutionality of any act shall not concern itself with degrees of propriety. But we say, based on pronouncements not only of statements of the Supreme Court, which I have set forth in my brief in *Darcy*, but statements made by the Court of Appeals for the Third Circuit, that this type of revisory jurisdiction is highly improper.

We think it is also demonstrated by the observation made by Mr. Justice Jackson in the concurring opinion in *Brown v. Allen* where he set forth the resolutions adopted by the Conference of Chief Justices of the State Appellate Courts in which they also expressed their concern with the propriety of it.

Now we don't believe that Congress ever intended to confer this type of jurisdiction upon the single Federal Court. I went back to the debates involving the Act of 1867, the predecessor of our present Revised Judicial Code, and there is not one word of evidence in those debates that Congress ever intended to confer that jurisdiction. And I have made reference to certain contemporaneous statements. As a matter of fact, I believe Mr. Justice Jackson in the concurring opinion (27) in *Brown v. Allen* pointed that out also. I believe that is in my brief, sir. And I have also pointed out arguments and articles by con-

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temporary writers of that time that Congress never intended to invest Federal courts with such revisory jurisdiction. But the Supreme Court has said, in effect, it did, and we have got to take it that way. I say if it did, Congress has exceeded its power conferred by the Constitution. That is the proposition —

BY JUDGE MURPHY: Has it occurred to you that if your argument is sound and has merit to it sufficient to the point, that it would be necessary in order for this Court to declare it unconstitutional to have a three judge Court because of the requisite of a three judge Court where the constitutionality of an act of Congress is attacked? Did you consider that?

BY MR. RYDER: That only applies to State acts, doesn't it?

BY JUDGE MURPHY: There is a statute, as I recall it, that says that where the question is going to be raised as to the constitutionality of a Federal statute that the Attorney General is to be notified and afforded an opportunity to be present.

BY MR. RYDER: We have already done it.

BY JUDGE MURPHY: There is a case after that that says even though the Attorney General was not notified it was all right to proceed, and in order to set aside certain orders of a commission or certain state questions you have to have a three judge Court.

(28) Your impression, I take it, is that does not apply where it is a Federal act itself.

BY MR. RYDER: It isn't my interpretation.

BY JUDGE MURPHY: You agree we do not have to have a three judge Court where it is a Federal act.

BY MR. RYDER: Yes sir, that is my interpretation. With respect to the Attorney General, I notified the Clerk. I presume he notified the Attorney General. He was likewise notified in the Elliott case. He was directed by the Court of Appeals to file a brief. That is with respect to the constitutionality of the Act of Congress. And that time expired February 22, and to the best of my knowledge, he has not filed a brief. I do not know whether he intends to do so or not.

Now then, that brings me down to the last point. Assuming that this is not a suit against the State, one; assuming that the jurisdiction which this Court is being asked to exercise in this application is not in violation of any of the constitutional provisions, which I have set forth; assuming that the statute is constitutional, still I say that this Court does not have jurisdiction, and again this argument is predicated on matters which were not presented to the Court of Appeals. Now the reason—my reasons for this are these: As a condition precedent to coming into this Court the applicant has got to establish he has exhausted State remedies. That has got to appear on the face of the record. It should appear on the face of the application. He ought to make an allegation to that effect. But you can (29) examine this application in vain, and you will not see any allegation of that effect. He was given the right by the Court of Appeals to amend his application, but he hasn't yet done it, and even if he would do it, it wouldn't entitle him to the relief that he is seeking here.

This very issue upon which this Court has been directed to make an inquiry, that is the alleged community hysteria which operated to deprive the applicant from receiving a fair and impartial trial as guaranteed by the "due process" clause of the Fourteenth Amendment, could have been presented to the

Pennsylvania courts in numerous ways. It could have been presented by an application to the Trial Court for a change of venue or for a continuance. Or it could have been made at the trial by a motion for the withdrawal of a juror. Or it could have been made post-trial on application for a new trial. Three ways in the Trial Court. The matter could have been raised in the matter being presented to the Supreme Court of Pennsylvania on direct appeal and to the Supreme Court of the United States on Certiorari. Now to that I add one other remedy. It isn't very often resorted to, but he had a remedy. If he made an application for change of venue and he was unsuccessful, he could have made the same application to the Supreme Court. The Supreme Court has the power to issue a Writ of Certiorari to the Trial Court and take that indictment out of that court and send it to another county for trial. It has done it. As a matter of fact, they did it in a case my learned adversary was Counsel, *Commonwealth v. Riley*.

It is not contended in the application that he exhausted those remedies. It is not contended in the application that (30) they were inadequate. He has never contended anywhere—in this Court, the Court of Appeals, any place—he exhausted those available remedies —

BY JUDGE MURPHY: Am I right in saying he could have raised it before trial by a motion for a continuance or change of venue; he could have raised it at the trial by a motion for withdrawal of a juror; he could have raised it after the trial on appeal before the State Supreme Court —

BY MR. RYDER: He could have raised it on an application for a new trial to the Trial Court.

BY JUDGE MURPHY: He could have raised it on an application for a new trial to the Trial Court; then before the

State Supreme Court or the United States Supreme Court on the way up. Now then, he didn't do that. Now then, it comes along here or goes before the Supreme Court of Pennsylvania and he asks for a Writ of Certiorari. The Trial Court have a right to reargument nunc pro tunc. Isn't that what he did?

BY MR. RYDER: He did that; yes sir.

BY JUDGE MURPHY: Now then, do you have here a copy of that Petition or is there anywhere a copy of the Petition to see exactly what he raised at that time?

BY MR. RYDER: I don't think I have that here. I came up here with a whole volume of records in a suitcase, but I don't think that is in there.

(31) BY JUDGE MURPHY: In your brief at Page 9 you say:

"... that it was then, for the first time, mentioned to the Supreme Court of Pennsylvania in an application for certiorari and reargument ..."

I wonder if it was raised then. As I recall it, there was something raised in the application for certiorari and reargument. Then the matter came before this Court and, as I understood it—I may be wrong—there were things raised before this Court that had not been raised before the Supreme Court, and we gave counsel an opportunity to go before the Supreme Court in a Petition for a Writ of Habeas Corpus in order to raise the very issues that were raised here.

BY MR. RIDER: Yes sir.

BY JUDGE MURPHY: And if you say at Page 9 that it was raised then for the first time, it may be you are not stating a fact.

Argument of Counsel

BY MR. RYDER: That well might be. I am apologizing.

BY JUDGE MURPHY: I think it is important myself that it be right.

BY MR. RIDER: Certainly.

BY JUDGE MURPHY: And I would like to see a copy of the Petition that was presented for Writ of Certiorari and Reargument, and then a copy of the Petition that was presented after they had been before this Court and then went to the Supreme Court, the (32) Petition for Writ of Habeas Corpus.

Not now. Just make a note of it. I would like to have it.

BY MR. RIDER: I have a copy of the Petition for Writ of Certiorari—not Writ of Certiorari but Habeas Corpus in the Supreme Court.

BY JUDGE MURPHY: Now then, as I understood it, to develop it further, whether it was raised in the Petition for Certiorari, and Reargument, or whether it was raised in the Petition for Writ of Habeas Corpus, as I understood it, you say that it could have been raised in all these other ways.

BY MR. RIDER: Yes sir.

BY JUDGE MURPHY: But in assuming that it was raised then—you say that it was raised or it was not raised then—which?

BY MR. RIDER: I would have to concede, Your Honor, that it was raised there.

BY JUDGE MURPHY: All right.

BY MR. RIDER: The point I am going to make is it was not decided —

BY JUDGE MURPHY: That is what I am coming to. That is my next question. Assuming that it was raised in either one of those two Petitions, and, as I understand it, when they were before us the question of what occurred in the way of the sentence of the work before (33) and what occurred by way of remarks of the sentence on the Saturday apparently of the verdict on June 12; that is the little fellow from Philadelphia on some other case; and what was apparently alleged to have been done by Judge Boyer were all before us. And if they were before the Supreme Court of Pennsylvania, as we said, for them to pass on them, then, as I understand it, if they were raised, then the Supreme Court in their Opinion, the Per Curiam Opinion, referred to Judge Boyer; they don't spell it out; they say certain things and they refer to certain things in connection with the jury. I am not sure they mention anything about the newspaper publicity. But they did make a finding that there was not sufficient in the Petition of the Relator to warrant granting a Writ of Habeas Corpus. And, as I understand it, Judge Maris said that if they did make that judgment they in fact have made a finding that there was not sufficient merit in the Petition presented to them to warrant granting the Writ.

Do you say they didn't do that?

BY MR. RYDER: I don't think as I analyze the Opinion of the Supreme Court of Pennsylvania refusing the application for a Writ of Habeas Corpus, they did expressly or by implication, as I analyze the Opinion, pass upon this issue of community hysteria which might have operated — according to the allegation — or which did operate here — to deprive the applicant of a fair and impartial trial. And I can understand

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why they wouldn't do it because if they would do it, it would be tantamount to converting the Petition for a Writ of Habeas Corpus into a delayed motion for a New trial. In Pennsylvania it isn't available to review errors. It is not a substitute for an (34) appeal. It is not a substitute for a motion for a new trial.

BY JUDGE MURPHY: Now let me see if I can state your argument so it will be clear to me. You say in the Opinion at 367 Pa. 130 that the Supreme Court did in a Per Curiam Opinion deny the Writ. They say at Page 133: "We find the present petition for a writ of habeas corpus to be wholly without merit . . ." And then they go on and they discuss certain things in connection with the alleged misconduct or incompetency, or whatever term you desire to use, in regard to the counsel for the defendant, and then about the interviews with the jurors. And then they say: "We do not deem it necessary to comment upon the criticism of Judge Calvin S. Boyer beyond stating that there is nothing whatever to indicate that any statements or actions on his part were prejudicial to relator's having a fair and impartial trial . . ."

Now then, there is no mention of the question of hysteria and prejudice, and your argument is then that—we would take it, what you argue is that the Supreme Court in its judgment felt that that was a matter properly to be raised on appeal and not to be raised in a collateral proceeding in a Petition for Writ of Habeas Corpus.

BY MR. RYDER: Yes sir; that is precisely my position.

BY JUDGE WATSON: According to the Petition presented to the Supreme Court, was there any mention made of hysteria such as brought before us at this time?

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BY MR. RYDER: (35) In answer to that question I would say yes. I believe the applications in the Supreme Court and this Court were almost identical.

But I can understand why the Supreme Court of Pennsylvania wouldn't pass upon it in the application for a Writ of Habeas Corpus because it would be converting it into a motion for a new trial and would have been making it into a delayed motion for a new trial.

BY JUDGE WATSON: That is your view as expressed a few moments ago.

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: Let me say this: On Page 5 of the Petition for Writ of Habeas Corpus presented to this Court the following appears:

"That the hysteria and prejudice, which swept the town, as the result of the Zietz and Foster trial and verdict, was so general as to influence beyond a slight degree those jurors included in the panel from whom the jurors who actually tried the relator upon the charge of murder were selected."

So that it was raised here and after being here they went before the Supreme Court of Pennsylvania. But what was in that Petition actually, we will find out or learn upon an examination.

All right.

(36) BY MR. RYDER: So naturally the refusal of the application by the Supreme Court of Pennsylvania was not an expression of opinion on the merits. There was not an adjudication of that issue at all.

Now I am frank to admit —

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BY JUDGE MURPHY: If the Supreme Court of Pennsylvania, in effect, had it before it and if the Supreme Court felt this is something that should be raised on appeal and can not be raised on habeas corpus but did not say so, hasn't the matter been adjudicated in the sense they say it is *functus officio*, it is a dead issue?

BY MR. RYDER: I was about to say if the matter had been adjudicated by the Supreme Court of Pennsylvania in the application for a Writ of Habeas Corpus that we would be in exactly the same position we were in in *Smith v. Baldi*.

Now the only reason *Smith* was able to get into the Federal courts in that case is because the Supreme Court of Pennsylvania did in the application for a Writ of Habeas Corpus pass upon the issue there involved, although I think—and I thought then—I still think it should have been raised in the direct appellate court proceeding, but they gave him the benefit of the doubt —

BY JUDGE MURPHY: That was the Opinion of Judge Goodrich where he covered the question of sanity and the like.

BY MR. RYDER: Yes sir. You read the Opinion in *Smith v. Baldi* and *Daniels v. Allen*. They make a distinction between *Smith v. (37) Baldi* and *Daniels v. Allen* on the ground the Supreme Court of Pennsylvania treated the application for a Writ of Habeas Corpus in that case as a substitute for an application for a new trial. But here they did not. They have called a halt to it —

BY JUDGE MURPHY: You say *Allen* says they did use it as a substitute?

BY MR. RYDER: *Daniels v. Allen*, a section of the Opinion.

BY JUDGE MURPHY: What did it say?

BY MR. RYDER: Daniels v. Allen said made the distinction between that case and Smith v. Baldi on the ground the Supreme Court of Pennsylvania had allowed it as a substitute for an appeal.

Now then, my position in short, is he did not exhaust his remedies in the Pennsylvania courts and, therefore, under the ruling of the Supreme Court in Daniels v. Allen this Court does not have jurisdiction. That is the very first question you have got to determine —

BY JUDGE MURPHY: Do you mean he didn't "exhaust" or "exercise"?

BY MR. RYDER: Both.

BY JUDGE MURPHY: If he didn't exercise, did he exhaust? If you could raise it in six ways and you didn't, you get to the end of the road, haven't you exhausted it?

BY MR. RYDER: You probably have exhausted it, but not in the sense (38) the word "exhaust" is used in Section 2554 —

BY JUDGE MURPHY: What do you say they could do as of this moment that they haven't done?

BY MR. RYDER: What —

BY JUDGE MURPHY: The Relator—in order to exhaust his State remedies what can he do?

BY MR. RYDER: Absolutely nothing. He is foreclosed from raising the question of community hysteria, and properly

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so, because if he isn't, there will never be any end of any litigation. I think that is amply demonstrated by this case. Of course, if he didn't exhaust his State remedies he couldn't get into the United States Supreme Court because there was a substantial Federal question involved.

I am mindful of the fact the majority of the Court of Appeals said he did exhaust State remedies. Judge Biggs, I think, wrote that Opinion.

BY JUDGE WATSON: Judge Biggs wasn't in the majority.

BY MR. RYDER: He was on this point.

BY JUDGE WATSON: Where is he in the majority?

BY MR. RYDER: He wrote the majority Opinion.

BY JUDGE WATSON: (39) I thought Judge Maris did.

BY JUDGE MURPHY: No. Neither did. All they could agree on was a Per Curiam.

BY JUDGE WATSON: The Per Curiam was really based upon Judge Maris' Opinion, was it not?

BY JUDGE MURPHY: No. A very nice question. As I understand it, Judge Biggs wrote one Opinion; Judge Maris wrote one Opinion; Judges Kalodner and Hastie wrote one Opinion; and the Court wrote a Per Curiam.

BY MR. RYDER: Anyhow, I am assuming he made the statement; but I am taking the position there isn't one bit of evidence in the record.

BY JUDGE MURPHY: But if you will recall: Judges Kalodner and Hastie agreed with Judge Biggs overall, but disagreed—let's see.

"Kalodner and Hastie, Circuit Judges, join in the views expressed in this opinion insofar as they relate to the alleged atmosphere of hysteria and prejudice prevailing at Darcy's trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial."

Now then, they then after that—they did follow Chief Judge Biggs' Opinion—then on Page 428 they say, Judges Kalodner and Hastie:

"We agree with all that is said and decided in the per curiam opinion of the court.

(40) "We also agree with Judge Maris' analysis of the very limited reach of due process of law when invoked to remedy shortcomings of the defense made by counsel of choice in a criminal case. The district court rightly disposed of this issue."

Now then, if you go to the Per Curiam Opinion, and that is listed first in 203 F. 2d 407 at 409, they say:

"The majority of the court is of the opinion that the relator must be afforded the opportunity to prove the allegations set out in his petition for habeas corpus insofar as they relate to the alleged atmosphere of hysteria and prejudice prevailing at his trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, since the undisputed and incontrovertible facts as shown by the record do not countervail the allegations of hysteria and prejudice . . ."

Now then, the next paragraph:

"The court has considered the allegations of the petition concerning the conduct of Darcy's counsel . . ."

The next paragraph:

"All members of the court are of the opinion that the affidavits of members of the jury must be stricken from the relator's petition."

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Next paragraph:

"The respective views of the members of the court are set out in the opinions which follow this per curiam opinion."

Next paragraph:

(41) "The judgment of the court below will be reversed with the direction to enter an order staying Darcy's execution until the disposition by the court below of the instant case on remand on the issue of alleged hysteria and prejudice. The court below will be directed to strike from the petition for habeas corpus the jurors' letters attached thereto. The stay order entered by this court will be vacated."

Now then, Chief Judge Biggs' Opinion —

BY MR. RYDER: The point that I —

BY JUDGE MURPHY: — is joined only by Judge McLaughlin, so that can't be the majority Opinion.

BY MR. MARGIOTTI: That is correct.

BY MR. RYDER: I was assuming that Judges Hastie and Kalodner had joined with Judge Biggs —

BY JUDGE MURPHY: They joined the other only on hysteria and prejudice including Judge Boyer's asserted visits.

BY MR. RYDER: The part of Judge Biggs' Opinion directed to the point I was just making appears on Pages 410, 411—203 F. 2d —

BY JUDGE MURPHY: You have the wrong citation in your brief. You have 204. You might just as well correct it. You have 204 instead of 203.

(42) While I am at it—that is on Page 4 of your brief—then

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on Page 6 of your brief in your statement you have "... The judgment and sentence were affirmed, opinion reported at 364 Pa. 294 ..." That is only one-half of it. There is another, 364 Pa. 288. There was Zietz and Foster, one by Justice Horace Stern and one by Justice Allen Stearns.

BY MR. RYDER: Now the point that I was making covered by the statement of Judge Biggs, that is with respect to exhaustion of State remedies, is he said:

"... The Supreme Court of Pennsylvania denied the second petition for habeas corpus filed to it, sub nom. Commonwealth ex rel. Darcy v. Claudy ..." giving the citation—"... passing on every substantial ground alleged in the petition."

BY JUDGE MURPHY: But only one other Judge joined in that Opinion.

BY MR. RYDER: He gave the applicant the benefit of the doubt, and I am glad Your Honor pointed that out to me. I assumed Judges Hastie and Kalodner joined with Judges Biggs and McLaughlin in this phase of the case. But that makes my position even stronger. I felt I had to get over that very fact.

I was going to make the point there isn't one bit of evidence in this record from which the Court could make that determination.

If there was a void in the Opinion of the Supreme Court it was the applicant's duty when he took that case into the Supreme Court of the United States, or even when he came into this Court—it was the applicant's duty, if he could, to have (43) that void corrected by way of amendment. But I venture to say he couldn't have corrected that void by way of amendment.

I have given the explanation why the Supreme Court of

Pennsylvania have refused to pass upon that point in that application.

Now then, if the Supreme Court of Pennsylvania didn't pass upon that point, under *Daniels v. Allen* this Court does not have any jurisdiction.

BY JUDGE MURPHY: I take it, the only way we could find out is send to the Supreme Court of Pennsylvania and say "Did you refuse to pass on it because it could be properly raised on appeal, or did you fail to pass on it?"

BY MR. RYDER: It isn't this Court's duty to do it.

BY JUDGE MURPHY: We want the answer—if nobody has the answer.

BY MR. RYDER: It is the applicant's duty to state that in his application.

BY JUDGE MURPHY: You say the applicant must allege he has exhausted and prove it.

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: All possible attempts you say have been exhausted.

BY MR. RYDER: Yes sir. It is his duty to put that in his application. If he fails to put that in his application, then this Court has no jurisdiction. It has no right to even entertain it (44) any further. That is on the jurisdictional point with regard to State remedies.

I take this further position with respect to jurisdiction in this Court, and that is that it doesn't appear on the face of the

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record—on the face of the application that he is being detained in custody in violation of the Constitution of the United States.

Now Section 2241 of the Code, which confers upon this Court the power to issue writs of habeas corpus, says: "The writ of habeas corpus shall not extend to a prison —"

Section 2241 of the Code, which confers the jurisdiction upon this Court to issue writs of habeas corpus, says that "The writ of habeas corpus shall not extend to a prisoner unless . . . He is in custody in violation of the Constitution . . ." "Unless," "shall not." That means when he comes into this Court he has got to establish *prima facie* that he is being detained in custody in violation of the Constitution.

Now it has been said by the Supreme Court in *Frank v. Mangum*, 237 U.S. 309, one of the leading cases on this phase of litigation, that a man is not in custody in violation of the Federal Constitution if the State has provided an adequate corrective judicial process whereby the basic matters upon which that unconstitutional detention is based may be judicially probed. Now that is the effect of it.

I will finish very shortly —

BY JUDGE MURPHY: There was a question of taking a ten-minute recess. You take all the time you want. If you want another hour, you take it.

Let's see—we will take a ten-minute recess. You have (45) been going, and the Stenographer has been going all the time.

(Recess.)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

BY MR. RYDER: Just before the beginning of the recess

I was calling to the Court's attention the decision of the Supreme Court in *Frank v. Mangum*, 237 U. S. 309. The substance of that decision, which has never been overruled or modified, was that the judgment—criminal judgment is not constitutionally void if the State provides a corrective judicial process. Now that is the sum and substance of that decision. In short, that it is only voidable and if it is only voidable, then the writ of habeas corpus doesn't lie because it has been asserted again and again that the writ of habeas corpus is available only where the judgment is an absolute nullity—void.

Now then, here is the process, Your Honors, by which we come to the conclusion that he has no standing here in this Court on this application: Under Section 2254 he is required to exhaust his State corrective judicial processes before he can come on here. Now then, when he comes back here and says that he has exhausted his State corrective judicial processes he, by necessity, has to admit that a corrective judicial process is available. Therefore, the judgment is not constitutionally void but only voidable. Then you apply the rule in 237 U. S. 309, *Frank v. Mangum*.

Now I want to refer, Your Honors, if I may, to a recent decision of the Court of Appeals, Ninth Circuit, *Palakiko v. Harper*, 209 F.2d 75 —

BY JUDGE MURPHY: Is that in your brief?

(46) BY MR. RYDER: No sir. It just came to my attention following the preparation of the brief.

And I refer you to Pages 80 and 81 —

BY JUDGE MURPHY: Is it lengthy—the quote you are talking about?

BY MR. RYDER: No, it isn't.

BY JUDGE MURPHY: We would like to hear it read.

BY MR. RYDER: These remarks, Your Honors, are directed to Section 2255, the provision with respect to a delayed motion for a new trial which lays down the same result as Section 2254. Section 2254 applies to State prisoners; Section 2255 applies to Federal prisoners. He says here that "The rule thus stated . . ."—he is talking about *U. S. v. Rosenberg*, which I have cited in this case, and I take this case to emphasize to this Court that if this decision by the Court of Appeals for the Third Circuit is correct, it is absolutely in conflict with *U. S. v. Rosenberg*. I am speaking with respect to this phase of the inquiry.

He says:

"In *United States v. Rosenberg* . . .—giving the citation, . . . the court, speaking of the remedy under Section 2255, Title 28, and comparing it to the writ of habeas corpus, said: 'It, like that writ, cannot ordinarily be used in lieu of appeal to correct errors committed in the course of a trial, even though such errors relate to constitutional rights.'

(47) "The rule thus stated finds its support in numerous cases some of which are there cited . . . It would appear that if the fact that the accused has not taken the appeal which was available to him prevents a collateral attack upon a conviction by petition for writ of habeas corpus, or under Section 2255, a similar result must obtain where, as here, the appeal was actually taken and the issue decided adversely to the appellant . . ."

That is exactly the same situation that the applicant finds himself in here when he comes into this Court and says "I have exhausted my State remedies." He is, in effect, saying that it is—the judgment is only voidable, and not having been successful in securing a reversal of that judgment in the State court or down in the Supreme Court of the United States, we

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must assume it is no longer voidable, and even if it were voidable, this Court wouldn't have the power to entertain the Writ here unless it is absolutely void, and he can't say it is absolutely void.

I have set down certain points and principles controlling the disposition of this application. I say if this Court entertains the application and goes into a hearing on the merits of the case, it will be a violation of the several principles which I have set down here. First, Point No. 1 is, by necessity, the purport to impeach the veracity of this record itself. That can't be done. That was decided by the Supreme Court in the case of *Riddle v. Dyche*, 265—as I recall—U. S.

Now you have got to bear in mind the record before this Court consists of the record in all the prior proceedings. The Supreme Court says that in *Brown v. Allen*, Footnote 19. In those (48) prior proceedings you have got the voir dire examination of the jurors. In those prior proceedings you have got the post-verdict statements of the jurors. I know that the Court of Appeals struck those statements from this record but, nevertheless, they were part of the record before the Supreme Court of the United States. I believe that this Court has got the power to consider those notwithstanding the fact they were stricken from the record. Those post-verdict statements themselves negative the very contention —

BY JUDGE WATSON: You say we should consider at this time and on this motion—consider those affidavits made by the jurors?

BY MR. RYDER: I am saying, Your Honor, that they can be considered for this purpose, that he proposes by this proceeding to impeach those statements which he himself put into the record —

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BY JUDGE MURPHY: What you are saying is that the Supreme Court of Pennsylvania has condemned having them there and the Third-Circuit Court has condemned having them there and ordered them stricken, and notwithstanding the fact they have been ordered stricken, since they were included in the Petition for Certiorari to the United States Supreme Court they may be considered by this Court insofar as their contents throw light on the question of whether or not there was hysteria and prejudice so far as it affected the jury.

BY MR. RYDER: Yes sir. Not only that but you may consider them for the purpose which I have suggested is an attempt to impeach the record, which he can't do. He is not only attempting to (49) impeach that portion of the record but he is attempting to impeach the voir dire examination of the jurors, and, on top of that, we have expressions of opinion by the Trial Judge that the applicant received a fair and impartial trial and the verdict was amply warranted —

BY JUDGE MURPHY: Nevertheless, we have a Mandate, the lower Court —

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: — which must be respected and followed.

BY MR. RYDER: Well, I am pointing these things out to the Court because they were not pointed out to the Court of Appeals in the course of my argument. We feel we have a duty to this Court, as well as to society, to point those things out to this Court. Therefore, in the discharge of my duty I am doing that today.

There is one thing more, and I am going to close on this

point. This Court, in effect, is being asked and it is, in effect, being directed by the Court of Appeals to conduct a hearing for the purpose obviously of making findings of fact which would be inconsistent with the implied findings of fact of the Pennsylvania Supreme Court. Assuming now—assuming now that the Supreme Court of Pennsylvania passed upon this phase of the case in the application for Writ of Habeas Corpus—if it didn't; he has no right here—if it did, this Court is being asked to do something which it can't do under the Seventh Amendment of the Constitution.

The only thing that this Court can do is take that (50) record as it has been made in the past and examine it for errors of Federal Constitutional Law. It can't take that record and make findings of fact either in conflict with the expressed or implied findings of fact of the State courts. This point was not argued to the Court of Appeals, and if it had been argued to the Court of Appeals, I believe we would not be here. We have given this question important consideration. We can't believe the Court of Appeals would have directed this Court to do that. And even if it did, we think that this Court still has a duty to observe that provision of the Constitution —

BY JUDGE MURPHY: What you are, in effect, saying is you are raising a point they wouldn't give you a rehearing to raise.

BY MR. RYDER: No. —

BY JUDGE MURPHY: You didn't raise it in the rehearing.

BY MR. RYDER: No, I didn't raise that point.

BY JUDGE MURPHY: There is one point you didn't

cover that is covered on the last page of your brief, Page 74. As I understand it, you argue that even if the Court were to deny the motion to dismiss and go into the hearing on the Petition for Writ of Habeas Corpus and then came to the conclusion that some relief should be afforded, that the Court does not have the right, power or jurisdiction to order the discharge of the prisoner but at most it could grant a new trial. Isn't that what you (51) argue? That is what your brief says.

BY MR. RYDER: If it grants a new trial you are exercising revisory jurisdiction, yes sir. Under the Seventh Amendment that is the most it can do. If the Court doesn't feel it can grant a new trial, that is a point in our favor with respect to the Commonwealth's argument —

BY JUDGE MURPHY: Isn't that what you argue?

BY MR. RYDER: I will concede your proposition—you don't have the power —

BY JUDGE MURPHY: "... If the decision be erroneous in that respect, it may be reversed and a new trial had. Provision for such revision was made in the twenty-fifth section of the Judiciary Act of 1789, and is retained in the Revised Statutes ..."

As I understand it, the most the Court could do would be to grant a new trial and that the Court has no right to grant a new trial by any statute or right conferred upon it.

BY MR. RYDER: That is right. As a matter of fact, I don't think it could grant a new trial on the indictment. I think —

BY JUDGE WATSON: How can we grant a new trial?

BY MR. RYDER: I don't know.

BY JUDGE WATSON: Whoever said we might?

(52) BY JUDGE MURPHY: The Supreme Court.

BY JUDGE WATSON: The Supreme Court —

BY JUDGE MURPHY: Yes. —

BY MR. RYDER: That is the very point I have been making —

BY JUDGE MURPHY: When I say the Supreme Court, there is a case *Virginia v. Rives*, 100 U. S. 313 at 338.

BY MR. RYDER: In closing let me just read, if I might, one statement by Mr. Justice Jackson in the laying of the cornerstone of the Research Center of the American Bar Foundation in Chicago on November 2, 1953, which appears on Page 19 of 40 American Bar Association Journal.

"Paradoxical as it may seem, in this age of general education our nation is plagued with unprecedented juvenile delinquency, gangsterism and shocking crimes followed only by long-delayed punishment or by none. The administration of our criminal law, from one cause or another, is a humiliation and a discredit to our profession and our country . . ."

On behalf of the Attorney General of Pennsylvania we thank this Court for its indulgence. We ask this Court—as I know it will—to appreciate the gravity of the issues which we have raised, the ramifications not only in Pennsylvania but nationwide. We as agents of the people of Pennsylvania ask you as agents of the people of Pennsylvania and the nation to (52a) do everything within your power and to help us out of this most

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unwholesome, undesirable dilemma in which we find ourselves involved.

BY JUDGE MURPHY: You refer to a footnote to Volume 10, American Bar Journal, a speech before the American Bar Association on the coverage of the Act of 1867. I believe they have that in the place in Harrisburg where they have the law books, the State Library.

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: Will you ask them to send it up so that I can take a look at it—so that the Court can take a look at it?

BY MR. RYDER: I shall be delighted to do it.

BY JUDGE MURPHY: I do think they have it across the street, but I don't think they go back that far.

BY MR. MARGIOTTI: When I said to the Court that I opposed the argument on this motion of Mr. Ryder I did so because last evening in going over the Petition I observed that he had cited approximately—oh, I think about ninety different citations. I don't know whether they are cumulative in effect or not—

BY JUDGE MURPHY: The ninety are all cumulative historically—decisions of which you, the General, are quite familiar.

BY MR. MARGIOTTI: No.

(53) BY JUDGE MURPHY: With all the experience you had you are not familiar with them?

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BY MR. MARGIOTTI: I am not familiar with all the cases cited at random any more than a person picks out a digest and hands it to me to look it over. That is the position I find myself in.

I am satisfied with the Court's ruling; I do not object to it. There were ninety-three additional citations and, in addition to that, so far as the first Petition for Writ of Certiorari was concerned, he had cited 117 cases, and of the 117 cases 89 are cited in this Petition. So he has 89 and the new ones. Of course, I had no way of checking on the new ones. I know something about the others. I did not have a thought or recollection of having made any special study of them because it was a long time ago and I couldn't do it overnight, and I don't think anybody expected me to do it. But I am satisfied Your Honor has properly handled the matter, and I am not objecting to the fact it is being heard. I would like to withdraw my objection.

When I said this was res adjudicata, I didn't mean that the Petition for Writ of Certiorari made this question res adjudicata. What I meant was that the decision of the Third Court of Appeals is res adjudicata because it is a decision—an application to reargue, and in that application to reargue I think practically every case cited is contained now in this new brief that has been presented to your Honorable Court —

BY JUDGE MURPHY: On the phase that Mr. Ryder talks about there are questions (54) by Judge Biggs joined in by Judge McLaughlin and not mentioned by the other five.

BY MR. MARGIOTTI: As to what?

BY JUDGE MURPHY: As to whether or not the Pennsylvania Supreme Court —

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BY MR. MARGIOTTI: Oh yes. It was mentioned by several, Judge Biggs —

BY JUDGE MURPHY: "The Supreme Court of Pennsylvania denied the second petition for habeas corpus filed to it, sub nom. Commonwealth v. Claudy, 367 Pa. 130, 79 A. 2d 785, passing on every substantial ground alleged in the petition."

BY MR. MARGIOTTI: Here's what I find on Page 20 of the printed Opinion: Judge Biggs said:

"... In the light of all the circumstances it must be concluded that the court below desired to afford Darcy a full and fair opportunity to exhaust his State remedy and that the decision of the court below should not be affirmed on the ground that when the final order on April 11, 1951 was entered Darcy had not then exhausted his State remedy as he has done now. Justice requires the case be treated as one in which Darcy has exhausted his State remedy as of April 11, 1951 ..."

BY JUDGE MURPHY: But Judge Maris said at that time you asked us to grant a stay and the reason we didn't grant a stay was we felt you had an opportunity to go before the United States Supreme Court and to get it, and we had found there was no substantial ground and (55) shouldn't grant it, but Judge Maris said notwithstanding that we failed to give it, or refused to give it, that he as a member of the Court of Appeals would grant the stay, and that the Supreme Court in October did deny the Certiorari, and that is when Judge Biggs wrote the opinion that the remedies had been exhausted and Judge Maris said they should be treated as having been exhausted.

BY MR. MARGIOTTI: That is right. The Relator pre-

sented such a Petition on April 9, 1951 which set forth all the grounds for relief asserted in the Petition previously filed in the District Court and now before us. This Petition was denied by the Supreme Court of Pennsylvania on April 10, 1951, and then we had the case go to the Supreme Court. Of course, that was in order to comply with the case—the Burford case, which has just recently been handed down by the Supreme Court of the United States. You were required to make an application at least for a petition on appeal from the Supreme Court.

What we did in the Supreme Court—as I recall it, when the Petition was first presented—I think it was presented to Judge Follmer who was in Philadelphia or near there; then we came before you. At one time I thought I would present a petition and did present a petition to the Supreme Court asking the Supreme Court to permit us to reargue the case *nunc pro tunc*, but they refused that petition and—do you have a copy of that here?

BY MR. RYDER: Yes.

BY MR. MARGIOTTI: May I see it?

(56) I don't want to make any statement about what is in that petition because I haven't seen that for a long, long time, and I don't remember what is in the petition.

But, at any rate, when we went before Judge Follmer, as I recall it, that petition had been refused and we came here. Your Honor very kindly agreed that it would withhold its decision on the matter until it was presented—until our Petition for a Writ of Habeas Corpus was presented to the Supreme Court of Pennsylvania, and we presented a Petition for a Writ of Habeas Corpus to the Supreme Court, and it was after that Your Honor rendered your Opinion. But at that time we had not exhausted our remedies because we had not filed with the United States Supreme Court because we hadn't had the time

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a Petition for a Writ of Certiorari, and we did file that later and it was refused, and the Circuit Court of Appeals in Philadelphia held that at the time they wrote their Opinion that the State remedies had been exhausted.

Now they said—both Judge Maris and, I think, Chief Judge Biggs, said that we had presented in our petition to the Supreme Court—and I have been trying to get a copy of the petition and I have sent for my papers at the office, but we haven't been able to find it. I am going to try to locate it sometime between now and the afternoon session —

BY JUDGE MURPHY: May I say to you that we have been furnished with a copy of the Petition For Certiorari To The Court Of Oyer & Terminer Of Bucks County And For Reargument Nunc Pro Tunc, as well as a copy of the Petition For Writ Of Habeas Corpus And Rule To Show Cause which was the second petition presented to the Supreme Court of Pennsylvania on — Do you have a request?

BY MR. MARGIOTTI: Your Honor, may I ask one question since you have looked (57) at it?

BY JUDGE MURPHY: Just one minute, please! — which would apparently be the Petition for Writ of Habeas Corpus of April 9, 1951.

BY MR. MARGIOTTI: That is while our Petition was pending before you.

BY JUDGE MURPHY: That is right.

BY MR. MARGIOTTI: In that Petition did we raise the question of hysteria?

BY JUDGE MURPHY: I don't know. It is lengthy and I will examine it over the recess. It is about fifteen pages.

BY MR. MARGIOTTI: All right.

Then I would prefer before going on with the argument to come to a conclusion on that one question because it will make some difference whether we did mention it or whether we didn't. And I would like to examine that Petition. I can do it very readily here, Your Honor.

Your Honor, may I call your attention to Page 3 of the Petition to the Supreme Court of Pennsylvania, being Paragraph 16, which reads:

"That the Relator did not have a fair and impartial trial as is contemplated and guaranteed by the Constitution, for the reason among others:

"That the atmosphere of the trial was such that the Petitioner could not have had a fair and impartial trial. The Relator was placed on trial at Doylestown on Monday, June 7, 1948, three days following the end of the trial (58) before the Honorable Calvin S. Boyer, of the co-defendants, Harry Zeitz and Harold Foster, who were found guilty on the preceding Friday, June 4, 1948, of murder in the first degree and the penalty fixed at death. After the trial of the Relator, the fourth defendant, Felix Capone, who had pled guilty, was sentenced by the Court to life imprisonment. The District Attorney, at the Pardon Board hearings in the Zeitz and Foster cases, declared that they were the 'leaders' and that Zeitz was the one who actually fired the shot which killed William Kelly.

"That upon the conviction by the jury of Zeitz and Foster, Judge Calvin S. Boyer, who presided at said trial, openly and publicly praised the jury for their verdict. On June 5, 1948, the 'Doylestown Daily Intelligencer' carried on its first page an article which stated that . . ."

I think the Court is familiar with that.

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"... A copy of said newspaper article is hereto attached made part hereof, and marked Exhibit 'A.'"

"That the hysteria and prejudice, which swept the town and county, as the result of the Zeitz and Foster trial and verdicts, was so general as to influence beyond a slight degree, those jurors included in the panel from whom the jurors who actually tried the Relator upon the charge of murder were selected.

"That on account of the hysteria which swept the town caused by the Zeitz-Foster trial, defendant's trial should have been postponed in the interest of justice (59) until a later date when he could be tried in an atmosphere of judicial calmness unaffected by the trial of his co-defendants. However, neither the Trial Judge, the District Attorney nor defense counsel took care of this vital matter, and on Monday, June 7, 1948, he was forced to go to trial before Judge Hiram H. Keller and a jury. The jurors were drawn from a second panel which had been summoned, the majority of whom were familiar with what had transpired during the prior week at the Zeitz-Foster trial and the Relator's connection therewith, including the Judge's utterances, and the public and newspaper comments thereon..."

"Then there is some more reference to what the Judge did —"

BY JUDGE MURPHY: As I understand it, it all boils down to the answer yes.

BY MR. MARGIOTTI: Yes.

BY JUDGE MURPHY: It was raised before the Supreme Court.

BY MR. MARGIOTTI: It was raised and we had exhausted our remedy.

BY JUDGE MURPHY: Now then, my copy of that Peti-

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tion—that just left here. I have the Petition for Habeas Corpus but the Certiorari paper—yes sir.

BY MR. MARGIOTTI: As I said to Your Honor, I say that this matter has been adjudicated by the decision of the Third Circuit, and that decision of the Third Circuit you have an Opinion of the Court, (60) a Per Curiam Opinion —

BY JUDGE MURPHY: And that the Per Curiam on which the Court agreed does not mention it. It is mentioned in Chief Judge Biggs' Opinion, but it is agreed to only by Judge McLaughlin. That is only a minority of seven.

BY MR. MARGIOTTI: Here's the way I have analyzed these decisions—if you will bear with me a moment, please.

Judge Biggs wrote an Opinion in which he resolved both questions in our favor, and the two serious questions were, one, of prejudice in the community at the time of the trial, and the other, of improper and inadequate representation —

BY JUDGE WATSON: You say he resolved it in your favor. Are you right about that?

BY MR. MARGIOTTI: I mean in his Opinion.

BY JUDGE MURPHY: Judge Biggs resolved it in the General's favor—in favor of Darcy.

BY MR. MARGIOTTI: Correct.

BY JUDGE MURPHY: Judge McLaughlin joined.

BY MR. MARGIOTTI: Correct.

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BY JUDGE MURPHY: Judges Hastie, Kalodner, Maris, Goodrich, and Staley refused to go along on that part of it.

BY MR. MARGIOTTI: (61) But Judge Kalodner and Judge Hastie did go along with part of Judge Biggs' Opinion, and that part has to do only with the question of prejudice. Therefore, we have four Judges out of seven on the question of prejudice —

BY JUDGE MURPHY: That is two to five on one and four to three on the other.

BY MR. MARGIOTTI: That is right.

And so I take the position on these questions that the Circuit Court by this decision has adjudicated the questions raised here by my friend Mr. Ryder —

BY JUDGE MURPHY: The only trouble with it is that it is not in the Kalodner and Hastie joinder; it is not in the Maris-Goodrich-Staley Opinion; it is only in the Opinion of Judge Biggs joined in by Judge McLaughlin as to the particular finding about which Mr. Ryder talked.

However, there is before us a Mandate from a majority of the Court as to what we should do.

BY MR. MARGIOTTI: That is correct.

And in this Petition, Your Honor, before the Circuit Court for Reargument, as I said, Mr. Ryder cited certain cases. Each and every one of the cases cited—not as many as he cites in his brief now before your Honorable Court—over—at least I would say about 1/10—roughly about 1/10—that number—are all to be found in the list of cases cited in the present brief.

And then he goes before the Supreme Court in an effort to get a Writ of Certiorari —

(62) BY JUDGE MURPHY: I am saying to you, General, any court—certainly the lower court—would be able to find as much light from a denial of a petition for reargument as it would from a denial of certiorari.

BY MR. MARGIOTTI: I think that is correct, except—that is correct, but so far as what is adjudicated, it is not what the Supreme Court has adjudicated. I don't claim that they adjudicate by refusing a writ of certiorari. I say what they do is they stand by the decision of the Circuit Court in that they don't allow the appeal and, therefore, the decision of the Circuit Court is final and res adjudicata.

BY JUDGE MURPHY: The other side say—as I understand it, what you say is the matter was raised for the first time in the Petition for Reargument before the Circuit Court; the Circuit Court denied reargument; the Supreme Court denied Certiorari. Do you say either of those is a new adjudication on that question?

BY MR. MARGIOTTI: As long as they fail in the Circuit Court of Appeals—they raise the question in the Circuit Court of Appeals, whether by reargument or by original argument—a petition for reargument, and a petition for reargument is denied, I would say it would be an adjudication.

Now with reference to the fact that the penitentiary has been changed to the State Penitentiary at Rockview—I think is the proper name, and the new warden is Fred S. Baldi, I admit that is correct, and I think heretofore—I don't know whether we did it by agreement or otherwise, but the papers filed (63) by Mr. Ryder in the Supreme Court—

BY JUDGE MURPHY: Well, I take it, you move to amend.

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BY MR. MARGIOTTI: — carry the proper names, and it isn't proper to move to amend.

BY JUDGE MURPHY: You move to amend your Petition so that the name may be changed in compliance with the statutory change in 1953.

BY MR. MARGIOTTI: And that the successor —

BY JUDGE MURPHY: To which the other side does not object—do you?

BY MR. RYDER: We have no objection to the amendment, Your Honor. It is absolutely immaterial. This case could have been very properly captioned "Ex Parte Darcy."

BY JUDGE MURPHY: That is what you say in your brief.

BY MR. RYDER: It helps emphasize the argument I have been making—it is a suit against the State.

BY MR. MARGIOTTI: We would also change the name of the Warden of the State Penitentiary at Rockview from John W. Claudy to Dr. Fred S. Baldi—is that correct?

BY MR. RYDER: No objection. That is correct.

BY JUDGE MURPHY: So that there is a motion to amend the name of the prison and the name of the warden, no objection, and it will be (64) allowed.

BY MR. MARGIOTTI: In fact I think we had agreed to

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a change before because he prepared his papers that way in the Supreme Court.

BY JUDGE MURPHY: It is three minutes before the noon recess, and I would like to ask a few questions so that the matters may be contemplated over the noon recess.

I would like to know the date of the indictment; the date of the argument on the motion for a new trial, the date of the Opinion of the lower court, and the date of the judgment and sentence of the lower court. And I want to check whether or not it is true that, according to the record, the date of the crime was December 22, 1947, and the date of the trial June 7, 1948, and the date of the verdict June 14, 1948.

BY MR. MARGIOTTI: Your Honor, we have here photostatic copies of the Clerk's records that give all that information exactly, and it is quite authentic. We will introduce that when the time comes.

BY JUDGE MURPHY: It is now 12:30 and we will recess until 2:00 o'clock.

(Recess.)

(Court resumes at 2:05 P. M. with all parties, including the Relator, David Darcy, present in Court.)

BY MR. MARGIOTTI: If Your Honor please, I would like to make my argument as short as possible, and I would like to make this comment with reference to the questions that have been raised by Mr. Ryder. I think they are wholly legal questions and that they should have been raised in the

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Court of Appeals and there argued, and I do not believe they can pick up an argument and raise it (65) piecemeal, one part before the Court of Appeals and another part before the District Court —

BY JUDGE MURPHY: Except jurisdiction can be taken up at any time.

BY MR. MARGIOTTI: That is right. I agree with you on the question of jurisdiction, but I don't believe the question of jurisdiction is a serious one. I don't think it is as serious as contended.

These questions have come up time after time and time again not only in Pennsylvania but all over the country, and the Supreme Court of the United States has had cases of this kind, many of them, and most Circuit Courts have had them, and I don't know that the question of jurisdiction has ever been raised successfully in any case. So that I believe that the—Your Honor has a very good grasp of the law involved and particularly the position as taken by Mr. Ryder. I compliment the Court on how fast you got the information in that brief —

BY JUDGE MURPHY: If you were up until 2:00 o'clock in the morning instead of resting over at the Casey, you would have had it too.

BY MR. MARGIOTTI: In the first place, I couldn't have read it. In the second place, I don't think I would have done it —

BY JUDGE MURPHY: I want you to know I got those papers about 10:00 o'clock last night.

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BY MR. MARGIOTTI: That is when we got them too, at the same time.

BY JUDGE MURPHY: All right.

(66) BY MR. MARGIOTTI: Mr. Ryder says to the Court —

BY JUDGE MURPHY: I say that I got part of them. But the Commonwealth had omitted part of the brief. Mr. Smith got part and took it up, and I started about 11:00 last night.

Go ahead. That is neither here nor there.

BY MR. MARGIOTTI: Mr. Ryder says you ought to give this matter very serious consideration and help him out, as he put it, in the serious question, and the people and State of Pennsylvania want to be helped out.

Of course, it is a serious matter. There is no question about that. It is also a serious matter to this Petitioner because his constitutional rights have been violated. The Constitution is for the benefit of everybody, no matter who he may be, and it is just as bad to violate a person's constitutional rights as it is to do what the Deputy Attorney General is asking this Court to do.

We have a number of witnesses here, most of whom would like to get away as soon as possible. Some of them have some very pressing reasons for wanting to get away today, and for that reason I am going to terminate what I am about to say now and leave the matter to the Court.

BY MR. RYDER: By way of rebuttal, if the Court please, I have lived with this case for over three years. I have examined the records starting in Bucks County. If there was ever a man who received his constitutional rights in the trial

of any criminal case, this applicant did. The Trial Judge in his Opinion refusing application (67) for a new trial specifically said so in the last paragraph of his Opinion.

I am not asking this Court to help us out—and by “us,” I mean the Commonwealth of Pennsylvania—but I am asking this Court to approach this problem in the light of the law and the Constitution of the United States.

As a matter of fact, Section 2243 of the Revised Judicial Code, the last paragraph, says the application shall be disposed of “as law and justice require.”

Now, I take it, that the Constitution is a constituent part of the law. I don't think there will be any disagreement on that.

I have pointed out in our brief over the space of 74—75 pages—if I may say so, this brief represents the crystallization of several years effort in industry on the part of our staff—not only of our staff but the staffs of other states.

He has not made out a case within the Constitution. First of all—I think I can quite clearly demonstrate that. There are two points I want to make—I will make them very brief—which I neglected to make this morning. This is on the constitutional phase. First of all, his application in this Court must, by necessity, be predicated upon the fact—upon the ground that the Supreme Court of Pennsylvania in its adjudication on the application for writ of habeas corpus made a mistake by an error of judgment.

An error of judgment is not a denial of due process of law. The Supreme Court of the United States has said that in many cases, and I have those cases cited in my brief.

(68) But let's look to the record, as this Court must look to the record. When the case was here before, what did the Supreme Court of Pennsylvania have before it? Not absolutely affirmative evidence—but moot facts, which are more persuasive than affirmative evidence could ever be.

The Supreme Court of Pennsylvania in its Opinion refusing

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the writ of habeas corpus characterized the trial attorney as a very highly reputable attorney, a man of forty years—I understand, trial experience. He was represented in the Supreme Court of Pennsylvania in the direct appeal and in another habeas corpus application, not filed by my learned adversary, by two others, highly able and skilled lawyers, as so stated by the Supreme Court of Pennsylvania in its Opinion.

Now that trial counsel didn't take any of the three steps, which I outlined in my argument this morning, which he might have taken.

The Supreme Court of the United States in the case of *Stroble v. California*—cited in my brief—343 U. S. 181, speaking through Mr. Justice Clark, pointed out during the course of its Opinion where practically the same point was being made as is being made in this application, that the failure of experienced trial counsel to make an application for a change of venue was a most significant factor in their determination of that issue. In the Court of Appeals for the Second Circuit in the case of *United States v. Rosenberg*, which I mentioned this morning during the course of my argument, there was also a re-emphasis of that factor.

If I might indulge for just a moment, I would like to read from the Court of Appeals, Second Circuit, *United States v. Rosenberg*.

(69) "... From November to February 21, 1951, there were no news items whatever concerning the pending prosecution. When a defendant believes that pretrial publicity has been such as to render impossible the selection of an impartial jury, there are well-organized methods of raising this issue before the trial commences. He may move for a change of venue or for a continuance until the public clamor shall have subsided. The petitioners took neither of these courses..."

Neither did the applicant in this case take either of these courses, although they were available.

"... On the voir dire the prospective jurors were carefully questioned as to whether they had read or heard about the case and a jury was selected satisfactory to the defendants..."

Now that occurred in this case.

"... who did not even use all the peremptory challenges permitted them..."

Now that occurred in this case as the Court pointed out in the course of its Opinion.

"... Nor do they allege that any trial juror was in fact prejudicted by the publicity now asserted to have made a fair trial impossible. Their present position is obviously an afterthought, inspired by the hope of securing a new trial after having exhausted all hope of reversing the verdict by appeal and petitions for certiorari..."

Now we have exactly the same thing here word for word, practically fact for fact —

BY JUDGE MURPHY: (70) There is one difference.

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: We have the majority of the Court saying—Judges Hastie and Kalodner suggested following the suggestion of Mr. Justice Jackson, that perhaps is a way out, and they recommend it for the future in this District—in this Circuit that where there are allegations in the petition, the Court might direct the petitioner to amend his petition so as to amplify and contain everything he wants to put before the Court. That could have been done in this case except we are confronted with a Mandate. The majority of the Court has said—that majority would be Judges McLaughlin, Biggs, Hastie, and Kalodner—apparently if it was just a question of what was in the petition—what happened on Friday before Judge Boyer and then the jury itself, and then

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what happened before Judge Boyer as to the sentencing of the boy from Philadelphia on the following Saturday, and then, in addition to that, the Judge Boyer incidents—Judge Goodrich and Judge Staley and Judge Maris said that even granting all the things that are there in the petition, in view of what is in the trial record and comparing those, there was not sufficient ground to allow a hearing. But Judges Biggs, McLaughlin, Kalodner, and Hastie say that apparently they never had an opportunity along the line from the time they first raised the question in the petition before the Supreme Court of Pennsylvania to prove the truth of what they say or to amplify it by other evidence, and that they should be afforded that opportunity, and the Mandate comes down and says afford to them that opportunity. That is where we are at.

BY MR. RYDER: (71) Well, our objection is predicated upon grounds which have not been presented before any tribunal in the nation —.

BY JUDGE MURPHY: You argue as a matter of law what has occurred in this country over the last ten years is in violation of the law, and you say you and the other thirty-nine Attorneys General are trying to bring about a solution, and in order to protect yourself, you have raised it more completely in this case than you did in the Elliott case and it is squarely before this Court for decision.

BY MR. RYDER: Yes sir.

We realize the limitation imposed on this Court as a result of the Mandate —.

BY JUDGE MURPHY: Except jurisdiction is always a question.

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BY MR. RYDER: Yes.

These issues were not presented to the Court of Appeals. Therefore, we felt they are open and not only may be considered but should be considered by this Court before it even goes into a hearing.

BY JUDGE MURPHY: All right.

All right, we say that it is the judgment of this Court on the questions presented on the motion to discharge the rule to show cause that—when I say “judgment,” I mean it is the opinion of the Court that our ruling thereon should be reserved. We will take it under advisement and in the meantime we will proceed to obey the Mandate of the Court of Appeals.

BY MR. RYDER: (72) As I said before, we felt constrained to present the issues which we have in our motion to discharge the rule to show cause to this Court.

I have been authorized by the Attorney General of Pennsylvania to inform this Court that we intend to file an application for a writ of prohibition to the Supreme Court, reluctant as we are to —

BY JUDGE MURPHY: You mean a writ of prohibition to prevent the Court—on a case that has been going on from December 22, 1947—from bringing it to a head. Is that the position of the Attorney General of Pennsylvania?

BY MR. RYDER: We are very reluctant to take this course, but we feel the issues are of such nation-wide scope that we have no alternative except to do that.

BY JUDGE MURPHY: There was a murder committed on December 22, 1947; the matter was before the lower court, then before the Supreme Court of Pennsylvania on May 26,

1949; there was then a petition for certiorari to the Supreme Court of the United States; there was then a petition for writ of habeas corpus dismissed by the Supreme Court of Pennsylvania on August 12, 1949; there was then a petition for certiorari to the Supreme Court of the United States; on October 24, 1949 there were two orders of the Supreme Court of the United States denying the petitions for certiorari; on March 21, 1951 the matter was before the Board of Pardons and refused; on March 31, 1951 the Board of Pardons refused a rehearing; on April 2, 1951 there was a petition for certiorari (73) to the lower court and for reargument nunc pro tunc; that was denied on April 3, 1951; there was then a petition for a writ of habeas corpus presented to the District Court on April 3, 1951; a hearing on April 5, 1951; the matter was then continued to afford an opportunity to the Relator to go before the Supreme Court of Pennsylvania; a petition for a writ of habeas corpus was presented to the Supreme Court of Pennsylvania on April 9, 1951, and denied on April 10, 1951; the hearing was resumed before this Court on April 10, 1951; and concluded on April 11, 1951; at that time this Court dismissed the petition for writ of habeas corpus, felt there was no merit to it, and in view of the Relator having opportunity, in the Court's judgment, to go to the Supreme Court of Pennsylvania or to the United States Supreme Court for a stay order, we refused to grant it; the matter then came before Judge Maris on April 11, 1951, and Judge Maris of the Court of Appeals granted the stay order; on May 17, 1951 this Court dismissed the application for writ of habeas corpus; there was then an application or a petition for certiorari to the United States Supreme Court; that was denied on October 8, 1951; the appeal was argued before the Circuit Court on January 7, 1952, reargued on December 1, 1952, decided on March 24, 1953, and the amended decision on March 28, 1953; a rehearing denied on April 29, 1953; and then a petition for writ of certiorari

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taken by the Commonwealth to the United States Supreme Court; that was denied on October 26, 1953.

So that after all of those movements have been taken and this Court is here with the witnesses ready to hear them in obedience to the Mandate of the Circuit Court, we understand the Attorney General's office feel that because of the gravity of the constitutional question that further delay should be (74) occasioned and that we should wait until such time as you have an opportunity to go to the United States Supreme Court and ask for a writ of prohibition in order to prevent the Court from carrying out the Mandate of the Appellate Court. Is that your position?

BY MR. RYDER: We are present in Court and ready to proceed. I made my argument on the ground we thought the Court didn't have jurisdiction. We think the Court does not have jurisdiction. We are here in Court ready to proceed. I have been authorized by the Attorney General to inform the Court what we intend to do. We don't wish to defer this matter any more. As I pointed out during my argument, we feel the basic fundamental issues are of such gravity —

BY JUDGE MURPHY: Why didn't you later on proceed as you indicate now you intend to do in accordance with the instructions of your superior?

In all fairness to Mr. Ryder, what he is saying is—of course, the mere fact he announces he is going to ask for a writ of prohibition, it may be denied—he is arguing for the discharge. In the meantime this Court goes right ahead and we don't stop until prohibited.

BY MR. RYDER: Very well, sir. We are ready to proceed.

BY MR. MARGIOTTI: Mr. Walter Schroeder.

Walter Schroeder—Direct

MR. WALTER SCHROEDER, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Schroeder, where do you reside?

A. Fairmont, Pennsylvania.

Q. What do you do?

A. I am a Deputy Clerk in the Court of Quarter Sessions in Bucks County.

Q. How long have you held that position?

A. Sixteen years, three months.

Q. Then you were holding this position at the time Foster and Zietz were tried—and Darcy?

A. Yes sir.

Q. And as such did you have charge of keeping the minutes of the proceedings?

A. No sir, I did not.

Q. Where were the minutes of the proceedings kept?

A. They were kept in the office but I did not keep them personally.

Q. I see. Was it the practice of your office to keep the minutes of the proceedings as cases progressed?

A. That is true, yes sir.

Q. Did you thereon record the different steps in the proceedings?

A. I assisted to a certain extent.

Q. Did you thereon record too the number of prospective jurors that were examined?

A. Yes sir, we did.

Q. And the disposition that was made in each case?

A. Yes sir.

Q. That is in the Clerk's record?

(76) A. Yes sir, that is right.

Q. And does it show the date of the indictment?

A. Yes, it did.

Q. Now, will you produce those records, please?

(Photostatic copy marked "Relator's Exhibit No. 1.")

BY MR. MARGIOTTI:

Q. I show you now "Relator's Exhibit No. 1"; Mr. Schroeder, tell me what that is.

A. This is a photostatic copy of the docket entries of Case No. 37, February Term, 1948.

Q. Would you mind raising your voice just a little?

A. This is a photostatic copy of the docket entries recorded in the Clerk's office at Doylestown, Oyer and Terminer Docket, No. 37, February Term, 1948.

Q. Do you have the original indictment in this case?

A. I have, sir.

Q. You don't have a photostat of this, do you?

A. No sir, I do not. I have a certified copy.

Q. Let me have a certified copy.

BY MR. MARGIOTTI: Is there any objection to using a certified copy?

BY THE COURT: I don't know.

BY THE WITNESS: Sir, the certified copy is part of the schedule we sent —

Walter Schroeder—Direct

BY MR. MARGIOTTI: I mean on the part of the Court.

BY THE COURT: We will rule on it when it is before us.

(77) BY MR. MARGIOTTI:

Q. Take it out. Do you know that "Relator's Exhibit No. 1" is a true and accurate photostat of the original docket entries?

A. I took it over to the photostat and that is what I got back. I will have to look at the docket.

Q. Did you certify it?

A. Yes sir, I did.

Q. Is the certification on that?

A. Yes sir, the certification is on that.

Q. Do you know whether or not it is a true and correct copy?

A. Yes sir, I do.

BY MR. MARGIOTTI: We offer it in evidence. Your Honor.

BY THE COURT: You offer what?

BY MR. MARGIOTTI: "Relator's Exhibit No. 1," which is the docket entries of the Zietz and Foster trial.

BY THE COURT: It also includes the indictment?

BY MR. MARGIOTTI: It doesn't include the indictment.

BY THE COURT: That is what I mean.

BY MR. RYDER: The indictment, at least, ought to be a part of the Supreme Court of Pennsylvania record on the direct appeal.

BY THE COURT: The only matter that is now before the Court is the offer of (78) "Relator's Exhibit No. 1," which includes only the docket entries. You are anticipating.

BY MR. RYDER: We have no objection.

BY THE COURT: All right, they will be received. The indictment as yet has not been offered.

(Certified copy marked "Relator's Exhibit No. 2.")

BY MR. MARGIOTTI:

Q. I show you now "Relator's Exhibit No. 2" so marked for identification only for the present, and tell me what that is. Speak loud enough so that the Court can hear you.

A. It is a certified copy of Indictment 37, February Sessions, 1948, Commonwealth of Pennsylvania v. Harold Foster, David Darcy, Harold Zietz and Felix Capone.

Q. Do you know where the original is?

A. Yes, here's the original.

BY MR. MARGIOTTI: If the Court please, we offer in evidence "Relator's Exhibit No. 2," being a certified copy of the indictment, as outlined by the witness, and I am returning the original to him, and I am only doing that so the Court can keep the original papers.

BY THE COURT: Is there objection?

BY MR. RYDER: No objection.

BY THE COURT: It will be received.

(79) BY MR. MARGIOTTI:

Q. Do you have the transcript of the testimony, as well as the examination of the prospective jurors on their voir dire, in the Foster and Zietz trial?

A. I do.

Q. Will you let me have it, please?

Mr. Schroeder, what is in the bundle—bags here?

A. That is the testimony and including the Foster and Zietz notes of testimony.

Q. Including something?

A. I don't have the volumes; there are five or six.

Q. There are five envelopes?

A. That is right.

Q. What did you say—including something?

A. I don't know what I said.

Q. I am wondering what you —

A. That is what I want to say. It is the notes of testimony taken during the trial of Zietz and Foster.

Q. Do you know whether or not the notes of testimony—there were daily transcripts of testimony on this trial?

A. Yes sir, there were.

Q. Do you have any personal knowledge of who received the daily transcripts of testimony?

A. I don't just understand what you mean —

BY THE COURT: Not to be technical but so that I will understand, do you mean there was a transcript of testimony made each day and available each morning, or do you mean throughout the trial there was made available a transcript of testimony?

BY THE WITNESS: (80) That is right. I believe it was taken by the Court Stenographer. I didn't see it until it was filed in the office of the Clerk of Quarter Sessions.

BY MR. MARGIOTTE: What I implied by my question—I am glad the Court asked the question—I got the wrong impression. I want to know whether or not the Reporter, as is here now, would every evening make a transcript of the testimony he had taken and then present it to the Court or District Attorney or Attorneys the next morning.

Q. Do you know?

A. I know nothing about it.

Q. Who was the Official Reporter that took that testimony?

A. Edgar Moore.

Q. Where is he from?

A. He is from Doylestown, Pennsylvania.

Q. Can you tell when the notes of testimony was filed in your office?

A. Not offhand, sir. They are on the front of the notes. They should be filed. They are in the docket. The docket will show that.

Q. Here's "Relator's Exhibit No. 1." Maybe you can tell from that.

A. I see here "September 18, 1948—Notes of Testimony Filed" pertaining to Harold Foster and Harry Zietz.

Q. Is there anything on the testimony itself to indicate that date?

A. Sir, I don't know. It is usually found on the back of the blue copy included among the volumes.

Q. Now this testimony which we will mark "Relator's Exhibit No. 3"—I haven't opened it up—but do you know whether it contains the examination of the jurors on their voir dire?

A. My recollection is that they do.

(81) (Exhibit marked Relator's Exhibit No. 3)

BY MR. MARGIOTTI: If the Court please, we offer in evidence "Relator's Exhibit No. 3."

BY MR. RYDER: We object as being irrelevant and immaterial.

BY MR. MARGIOTTI: The purpose of the offer is to show the crystallization of public opinion as shown by the examination of the jurors themselves while they were being examined under oath and to show, second, the extent to which the jurors read the newspapers and heard radio comments concerning the case of Foster and Zietz. The testimony is being offered for the purpose of laying the foundation to be followed up by other evidence by showing that this testimony was in some instances taken verbatim and in other instances summarized and published at large throughout the County while the case—while Harold Foster and Harry Zietz were being tried which had the effect of rekindling or lighting up a prejudice which had existed in the County where the case was tried.

BY MR. RYDER: I object to it on the grounds specified before.)

BY THE COURT: As we understand it, the Foster-Zietz trial occurred one week before one panel of jurors; the Darcy trial occurred the following week before an entirely different panel of jurors. What may have been known by some of those in the first week's panel may be absolutely unknown to the second week's panel. It may be that there is some light in the way of showing what public sentiment was. It does not necessarily follow that it (82) in any way got to the minds of the jurors in the second week. However, so that the defendant—the Relator will be afforded an opportunity to have his case spread out, we will take it subject to the objection and reserve ruling thereon.

BY MR. RYDER: We have an understanding he is offering only a portion of that —

BY THE COURT: No; he is offering the entire transcript consisting of five envelopes of papers which purports to be the entire transcript and he wants to show what happened on the voir dire, what questions were asked, what answers were made, what the evidence was and then to follow it up by showing, I assume, by word of mouth and by newspaper and by radio that these jurors that served on the Darcy trial heard about it.

BY MR. RYDER: We object.

BY THE COURT: Or that the general public was so inflamed to make a fair trial impossible all right.

BY MR. MARGIOTTI:

Q. Now do you have your docket entries for the Darcy trial?

A. Yes.

BY THE COURT: This is just some indication of where cases like this get to.

(Copy marked "Relator's Exhibit No. 4")

BY MR. MARGIOTTI:

Q. I show you now "Relator's Exhibit No. 4." Do you know what that is?

BY THE COURT: (83) Let me add, Mr. Margiotti, although the cases get to that point, it is the Constitution that we are interpreting and, therefore, we have the whole problem before us.

BY THE WITNESS:

A. This, sir, is a carbon copy of the docket entries that we submitted to the Pennsylvania Supreme Court. It is listed on our original docket that I have over there with me. Certified as being true and correct; was entered in the regular docket.

BY MR. MARGIOTTI:

Q. Well, this contains an entry for each action as the case against Darcy progressed until March 15, 1949 when a certiorari to the Supreme Court came to hand?

A. Yes sir, that is correct.

Q. And is it complete and accurate?

A. Yes sir, it is, to the best of my knowledge and belief.

BY MR. MARGIOTTI: We offer in evidence "Relater's Exhibit No. 4."

BY MR. RYDER: No objection.

BY THE COURT: It will be received.

BY MR. MARGIOTTI:

Q. Do you have the testimony in the Darcy case?

A. Yes sir.

Q. You have produced five volumes; that is five envelopes which you called each envelope a volume. What do those five envelopes contain?

A. Notes of testimony in the Commonwealth versus —

Q. Darcy —

A. Darcy, yes sir.

Q. Do you have the notes of the voir dire examination?

(84) A. They are contained therein in Volume 1.

Q. In Volume 1?

A. Yes sir.

Q. Does Volume 1 contain anything except the voir dire examination?

A. It is really the first day of the trial, I believe, sir. I just really recall it is the first day of the trial.

Q. You took an envelope out of the batch?

A. Yes sir. It is one similar to this for submission to the Pennsylvania Supreme Court. It is just a routine matter.

BY MR. MARGIOTTI: May I give this just one number? Maybe I better give it two.

BY THE COURT: Yes.

We understand that counsel is having the list of numbers assigned to the transcript of testimony in the Darcy case, and we suggest if you do break it down you call it "5", then "5(A)", "B" and "C" and so on.

BY MR. MARGIOTTI: Yes sir; that is right. I am having it marked that way. (Exhibit marked "Relator's Exhibit No. 5(A), 5(B), 5(C), 5(D) and 5(E)," respectively)

BY MR. MARGIOTTI: The witness has produced five envelopes which have been marked "Relator's Exhibit No. 5(A), 5(B), 5(C), 5(D) and 5(E)." "5(A)" contains the transcript of the voir dire examination of the jurors—of prospective jurors and perhaps some testimony. The other four volumes contain testimony. We offer them all in evidence for the following purposes: "5(A)" is being offered for the purpose of showing a greater crystallization of prejudicial public opinion against the defendant David Darcy than (85) appeared in the previous trial of Foster and Zietz; the other four volumes of

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testimony are being offered for any purposes which the Court may deem proper and particularly offered for the purposes of showing the conduct of Judge Boyer on one specific occasion, and also what occurred during one of the incidents referred to in the Petition when the District Attorney Biester obtained a note from Judge Boyer and walked up to the Judge at the end of the Judge's charge; and those two instances, Your Honor

BY JUDGE MURPHY: Mr. Margiotti, is there anything in that transcript about anything like that?

BY MR. MARGIOTTI: Yes.

BY JUDGE MURPHY: Where?

BY MR. MARGIOTTI: Toward the end.

BY JUDGE MURPHY: Point to the place where there is anything about him going up with the note.

BY MR. MARGIOTTI: No.

BY JUDGE MURPHY: That is what you said.

BY MR. MARGIOTTI: You said, "Is there anything in the transcript like that?"

BY JUDGE MURPHY: Is there anything in the transcript of his—well, saying (86) just what you said?

BY MR. MARGIOTTI: Not about the note. We are going to prove the note. We are going to prove what occurred. We are going to prove by the transcript what took place at that time to corroborate the individuals who testify.

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BY JUDGE MURPHY: What particular pages are you directing the Court's attention to in regard to Judge Boyer?

BY MR. MARGIOTTI: I have in mind one particular incident, Your Honor, and I think perhaps you remember this yourself, I won't have to refer to it, where Mr. Achey objected to Judge Boyer participating in the trial.

BY JUDGE MURPHY: Yes. I would like to have the particular page and I would like to know from counsel for both sides whether or not the jury was in the room at the time of that sidebar conference—whether you can stipulate or point out to the Court what happened.

The first question is where in the record did the Boyer incident occur? By "Boyer" I mean Judge Boyer.

While counsel are looking we might direct counsel's attention remember we made an observation as to where cases may get to. Here is a case: "'Intent' is state of mind difficult of precise proof." We say "state of mind" also is. You will find that in 100 F. Supp. 143, citing cases.

BY MR. MARGIOTTI: Your Honor, I call your attention first to Page 880 where it is marked "(Discussion at side-bar)," so I assume (87) it was at sidebar —

BY JUDGE MURPHY: 880?

BY MR. MARGIOTTI: Pardon me! It is 830 and 831. The conversation is as follows —

BY JUDGE MURPHY: Just a minute!
All right, you refer the Court to 830 and 831.

BY MR. MARGIOTTI: That is right.

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The discussion is as follows—do you wish me to read it, Judge?

BY JUDGE MURPHY: Just one minute, please.

Now then, at 832 they apparently go back into testimony. Doesn't that appear to be right? They ask the question of Lieutenant Hanlon at the top of the page.

BY MR. MARGIOTTI: Yes, apparently that is correct.

BY JUDGE MURPHY: Right.

BY MR. MARGIOTTI: That is the way it looks to me.

BY JUDGE MURPHY: All right; my question is—it can be answered along the line if anyone knows—whether or not the sidebar discussion was—strike off the “was”—occurred while the jury was in the box or out of the box.

BY MR. MARGIOTTI: (88) We expect to prove it was while the jury was in the box.

BY JUDGE MURPHY: It would seem to be so because there is a call for an offer of proof on 829 and there is nothing to indicate the jury was excused, so that they were probably in the box at the time of the sidebar conference.

All right, go ahead.

BY MR. MARGIOTTI: What occurred there was this:

“MR. BHESTER: We offer to prove by CX-71 . . .” —

BY JUDGE MURPHY: What occurred there is spelled out in the record.

BY MR. MARGIOTTI: Yes.

BY JUDGE MURPHY: Do you mean to vary the record in any way?

BY MR. MARGIOTTI: That is one of the purposes I am introducing the record —

BY JUDGE MURPHY: You stand on the record as it is portrayed on 829, 830, 831; is that right?

BY MR. MARGIOTTI: And part of 832—to show that they went into testimony thereafter.

BY JUDGE MURPHY: Now, is there any other Boyer incident in the record of testimony?

BY MR. MARGIOTTI: Now, with reference—no, Your Honor.

(89) BY JUDGE MURPHY: Let's get the date on the charge and then we will keep it in order.

BY MR. MARGIOTTI:

Q. Is the charge in here?

A. Yes sir; it is in the last volume.

BY JUDGE MURPHY: We ask counsel: The charge of the Court doesn't occur in either of those two volumes, does it?

BY MR. MARGIOTTI: It is in a volume by itself.

BY JUDGE MURPHY: We have it as the 3rd volume. Page 864.

BY MR. MARGIOTTI: No; 904 starting with —

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BY JUDGE MURPHY: Starting at 904.

What about 864? It is headed "CHARGE OF THE COURT." I mean the charge of the Court starts—doesn't it—at 864?

BY MR. MARGIOTTI: Yes, it starts at 864; that is correct.

BY JUDGE MURPHY: You are referring particularly to 904. I take it.

BY MR. MARGIOTTI: From 904 to the end of the charge which appears on Page—the top of Page 907, or rather at the bottom of Page 906.

Now, Your Honor, that part of the story—that part of the testimony that is in the charge there does not give all the facts which I outlined about the note. What we propose to do is to put on the stand certain witnesses who observed what took (90) place. And Judge Boyer on several occasions went on the bench and participated in the deliberations with Judge Keller.

BY JUDGE MURPHY: I take it then you say you are going to challenge the accuracy of the record—of the transcript from 904.

BY MR. MARGIOTTI: Not necessarily, because what occurred would not be on the record. I wouldn't expect it to be on the record.

BY JUDGE MURPHY: Do I take it you are now offering in evidence the charge of the Court commencing at Page 864 and calling the Court's attention to 904 et seq. and stating that you will follow it later by testimony pertinent thereto?

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BY MR. MARGIOTTI: That is correct, and the two together tell the story.

BY JUDGE MURPHY: As I understand it, there is one reference to Judge Boyer in the entire transcript of testimony; isn't that so?

BY MR. MARGIOTTI: Particularly I think it was the one that was called to your attention.

BY JUDGE MURPHY: I say particularly or otherwise; isn't there only one reference to Judge Boyer?

BY MR. MARGIOTTI: Mentioning him by name, I think that is correct. We intend to call a number of witnesses to show he participated during the trial.

BY JUDGE MURPHY: As we understand it, counsel is saying to the Court there (91) is one place in the record—he had indicated the page—where Judge Boyer appears.

BY MR. MARGIOTTI: It appears in such a way as to indicate he was participating and Mr. Achey was objecting to his participating in the trial.

BY JUDGE MURPHY: That is argument. The question is is there anyplace else?

BY MR. MARGIOTTI: I don't think there is anyplace else. We propose to present what I mentioned at the time of the charge of the Court.

BY JUDGE MURPHY: Go ahead.

BY MR. MARGIOTTI: Has Your Honor ruled as to the admissibility of the testimony?

BY JUDGE MURPHY: I think we ruled long ago.

BY MR. RYDER: We have no objection to the portion of "5(A)," the voir dire examination, or to the admission of 829, 830, 831, 832 or Page 904 to the end of the charge. We do object to the admission of the rest of the record.

BY JUDGE MURPHY: You have already offered all of it before the Court already. Don't you remember? We read it in order to write our Opinion before. And you offered it. It is all before the Court already, copies of it. Here it is here. It was offered at the time by the Commonwealth and the Court read (92) every word of the 900 pages before it wrote its Opinion, and the Circuit Court says we did in the Opinion, and Judge Maris.

BY MR. RYDER: I will withdraw the objection.

BY JUDGE MURPHY: All right; they are admitted.

I might say, in all fairness to Mr. Ryder, you have all sorts of cases of this kind and we don't. Our memory may be a little sharper or finer, or whatever you call it.

BY MR. MARGIOTTI: If the Court please, may I call Your Honor's attention to the fact that in the minutes the name of Harry T. Westlake, a prospective juror, is marked, as far as the disposition of the case is concerned, "Excused by the Court," marked that way, and I call your attention in connection therewith to the examination of the juror on Page 96 and 97 in which he expressed an opinion concerning the Darcy case:

"Q. Have you formed any opinion as to the guilt or innocence of this defendant, David Darcy?"

"A: Well, I think—yes, I have. It is one of the most cold-blooded murders I ever heard of."

Prior thereto three jurors had been selected and they were in the jury box —

BY JUDGE MURPHY: As I understand it, you have called the Court's attention to the notes of testimony. I take it you are referring to your "Exhibit No. 1," which consists of a number of pages, and somewhere there the entry appears. Will you kindly tell us for the record where?

(93) BY MR. MARGIOTTI: It is Pages 96 and 97.

BY JUDGE MURPHY: May I see your "Exhibit No. 1?"

BY MR. MARGIOTTI: I don't think it is "Exhibit No. 1." Here's "Exhibit No. 1." It is "Exhibit No. 4" and Mr. Westlake is No. 29 thereon.

BY JUDGE MURPHY: On page what?

BY MR. MARGIOTTI: Page 4. It is "Exhibit No. 4" but No. 27 is the juror.

BY JUDGE MURPHY: On page what of "Exhibit No. 4?" You say that somewhere in "Exhibit No. 4" there is an entry he was excused by the Court. Where in "Exhibit No. 4?"

BY MR. MARGIOTTI: You have got it.

BY JUDGE MURPHY: Where? There is about 80 people

BY MR. MARGIOTTI: Where it says 27th juror I think it is. They are numbered 1, 2, 3, 4, 5 in the beginning.

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BY JUDGE MURPHY: Juror 27 is Nicholas Mislan.
Juror 29 is Harry T. Westlake.

BY MR. MARGIOTTI: That is the man.

BY JUDGE MURPHY: As I understand it, you don't mean he was excused by (94) the Court before the trial and then called in to make this assertion.

BY MR. MARGIOTTI: No.

BY JUDGE MURPHY: You mean the minutes show he was excused by the Court and on Page 96 et seq. is his examination.

BY MR. MARGIOTTI: That is right; in which he expressed an opinion in the presence of all the other jurors, which goes to the —

BY JUDGE MURPHY: You say he made it before all the other jurors. All the other jurors were in the grand jury room.

BY MR. MARGIOTTI: I said three.

BY JUDGE MURPHY: The prospective jurors weren't in the room.

BY MR. MARGIOTTI: I don't think so; I don't know.

BY JUDGE MURPHY: We wish you would check and find out.

BY MR. MARGIOTTI: I will do that.

BY JUDGE MURPHY: We understand they were in one

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room and called in one at a time seriatim and examined and they did not remain in the room; they were either excused or put in the box and another juror called out from another room.

BY MR. MARGIOTTI: What I had in mind was to call your attention to his testimony. It would be in "5(A)" and 96 and 97.

(95) BY JUDGE MURPHY: We note at 97 when that occurred there was a motion for a new trial—a mistrial and the motion was denied.

BY MR. MARGIOTTI: The motion was denied and the Judge instructed the jury to pay no attention to it.

BY JUDGE MURPHY: Right?

BY MR. MARGIOTTI: That is correct.

BY JUDGE MURPHY: Judge Watson asks the question. Certainly it is in the affirmative? This was before the Supreme Court when the motion for a new trial was argued. The transcript was there.

BY MR. MARGIOTTI: I didn't argue this question.

BY JUDGE MURPHY: I know that. You weren't there when Mr. Schofield, Mr. von Moschzisker's son—I don't mean Mr. Schofield—Mr. Thomas McBride, Chief Justice, von Moschzisker's son and Mr. Achey were there and didn't raise the proposition.

BY MR. MARGIOTTI: That is right, and I have wondered why they didn't but they didn't raise it anyhow.

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BY JUDGE MURPHY: The fact is that they didn't.

BY MR. MARGIOTTI:

Q. Now can you tell us by looking at the record how many jurors were in the panel in the Foster-Zietz trial?

A. May I use the docket? I think I can find it better in the docket.

(96) BY JUDGE MURPHY: Yes sir.

BY THE WITNESS: I have the original docket here.

BY JUDGE MURPHY: All right.

BY THE WITNESS: Would you mind stating the question?

BY MR. MARGIOTTI:

Q. How many jurors were in the panel in the Foster-Zietz trial?

BY JUDGE MURPHY: When?

BY MR. MARGIOTTI: That were examined.

BY JUDGE MURPHY: It could be three or four sets. You call so many, so many are excused, so many appear, so many are examined.

BY MR. MARGIOTTI: There is the record there. I have never seen that.

BY JUDGE MURPHY: Then will you inquire?

BY MR. MARGIOTTI:

Q. Do you know how many jurors were examined of the regular panel?

A. 78.

Q. Will you state whether or not that panel was exhausted?

A. According to the record, it was.

Q. And how many veniremen were selected—or something?

A. Of the 78 original, 8 were selected.

Q. No, no. How many more were sent for; how many veniremen; how (97) many jurors did the sheriff go out and get?

BY JUDGE MURPHY: Talesmen.

BY MR. MARGIOTTI: Talesmen.

BY THE WITNESS:

A. 50 persons.

BY MR. MARGIOTTI:

Q. 50 persons. Was that exhausted too? Were those 50 examined?

A. Those 50 were examined. They didn't get a juror out of those 50; so they called another 50 subsequently.

Q. Then called how many more?

A. 25.

Q. And then was a jury selected out of the balance of the 25?

A. Yes sir; out of the 25.

Q. Do you know how many of the 25 were examined?

A. 17.

Q. 17 out of the 25. Now we go to the Darcy case. Do you

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know how many jurors were examined in the Darcy case?
You can look at your docket-entries.

A. There was 81.

Q. 81——

BY JUDGE MURPHY: Now just one minute, please.

BY MR. MARGIOTTI:

Q. Will you state whether the jury——

BY JUDGE MURPHY: Just one minute, please.

BY MR. MARGIOTTI: (98) Pardon me!

BY JUDGE MURPHY: All right, go ahead.

BY MR. MARGIOTTI:

Q. Will you state whether or not the jury were selected out of the 81?

A. They were selected out of the 81.

Q. That were examined?

A. That is right.

BY JUDGE MURPHY: Wait a minute! Let's have no confusion. Do you say all 81 were examined?

BY THE WITNESS: Yes sir; in the Darcy matter 81 were examined.

BY JUDGE MURPHY: Go ahead.

BY MR. MARGIOTTI:

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Q. And the jury was selected out of the 81?

A. Yes sir.

Q. Did they send out for any jurors?

A. No sir; that was the original panel.

Q. That was the original panel —

BY JUDGE MURPHY: Let me see the book you are reading from. Just a minute, please. Go ahead.

I just want to straighten one thing out. Apparently, according to what they say here and what the Court's recollection was, there were 14 selected, as I understood, from the 81. I don't know. You find out. You have only 12 selected so far.

(99) BY MR. MARGIOTTI:

Q. What—did you have alternates in the Darcy case?

A. That is what it includes, 12 regular jurors and 2 alternates.

Q. Did the two alternates come out of the 81?

A. Yes sir, they did.

Q. They did. So that you have 14 out of the 81?

A. That is true.

BY JUDGE MURPHY: While you are at that, let me ask one question. Were there alternates the week before?

BY THE WITNESS: Yes sir. Wait! I will check that back on the docket.

BY JUDGE MURPHY: They are only details but we might just as well be right.

BY THE WITNESS: Yes sir, there were alternates in the Foster-Zietz case as well.

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BY JUDGE MURPHY: There were what?

BY THE WITNESS: There were two alternates in the Foster-Zietz case.

BY MR. MARGIOTTI:

Q. In other words, there were 14 selected out of that number, you say?

A. Yes sir, that is right.

Q. Now do you know whether any of the jurors of the week during which Foster and Zietz were tried were held over for duty the following week?

A. I don't believe there were.

(100) Q. Do you know?

A. I don't recall. I can't remember that far back.

Q. If any of them had been held over, would that show in your minutes?

A. That would show in the Court calendar for that particular period that they were only drawn to serve one week and at the termination of this trial would be automatically excused because it is customary —

Q. The ones that were jurors would be automatically excused. What about the ones that weren't jurors? Were any of them held over for the following week?

A. No sir.

BY JUDGE MURPHY: You don't mean what you said, I take it. You said: "Were any of them held over for the following week?"

BY MR. MARGIOTTI: Yes sir.

BY JUDGE MURPHY: Was that what you answered?

BY THE WITNESS: I said no, they weren't held over, they only served one week.

BY MR. MARGIOTTI:

Q. Can you tell me when these jurors for the Darcy case were summoned?

BY JUDGE WATSON: Were they ever summoned for any particular case?

BY MR. MARGIOTTI: They were —

BY JUDGE WATSON: (101) You say—you mean when were they summoned for that week?

BY MR. MARGIOTTI: For that week, that is right.

Q. Do you know when the jurors that served during the week Darcy was tried—do you know when they were summoned, not particularly the Darcy jury but all the jurors for that week?

A. Well, our terms of Court of Quarter Sessions generally run three weeks. The grand jury would be followed by two weeks of traverse jurors. The regular way would be to notify these people to be there about ten days before the actual term that they are supposed to serve.

Q. When does that term begin?

A. Well, I don't have a Court calendar. I just don't remember what—Foster and Zietz, they were tried first. Apparently they were tried the week of May 24, 1948, and they perhaps were summoned maybe around the 12th or 14th to appear for jury service for that particular week. They are figured—whatever it amounted to—eighty-some people.

Q. What I am trying to find out is were these jurors summoned all at the same time or separate times?

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BY JUDGE MURPHY: Do you understand the question?

BY THE WITNESS: Yes sir, Your Honor.

The usual way in Bucks County this group of jurors were summoned for that particular week, not that they were going to serve on any particular case; they come in the regular jury week (102) for traverse jurors, the regular term of court. There would be 120 and ones who would come there would be numerous excused by the Court. In other words, in this case Foster and Zietz there were —

BY MR. MARGIOTTI: Read my question, Mr. Butler

(Question read by the Reporter.)

BY THE WITNESS:

A. I just don't recall how many people they brought in that particular week. That has been a long while ago.

BY MR. MARGIOTTI:

Q. Ordinarily, how long before the jurors report are they summoned?

A. They are summoned about ten days to two weeks before that actual time they report. The sheriff sends that out. I don't have anything to do with it.

Q. Ten days or two weeks to report?

A. I would say offhand ten to fourteen days before the actual week they are supposed to be there they are summoned or given notice.

Q. You say the sheriff does that?

A. Yes, the sheriff does that.

Q. Do you know if there was a venire issued for the jury?

A. There was a venire. I don't have it here. I can't tell the exact date.

Q. You can't tell when it was issued?

A. No sir, not from this record.

Q. Or any other papers you have here —

BY JUDGE MURPHY: The question is when did the venire issue for the week of June 7, 1948?

(103) BY THE WITNESS: Yes sir, I can.

"In the name and by the authority of the Commonwealth of Pennsylvania

"Honorable Hiram H. Keller, President of the Seventh Judicial District, consisting of the County of Bucks . . ."

BY JUDGE MURPHY: No; the date that was issued.

BY THE WITNESS: Well, it states there to be there—that is the first week—the 17th day of May 1948.

BY MR. MARGIOTTI:

Q. That is for the first week?

A. Yes sir. There there is another venire and it states here—it says this bunch of jurors is to serve for one week.

Q. That bunch served for a week; all right. Would you have anything for the next bunch?

A. Commencing on the 17th day of May 1948. It says:

" . . . to serve for the term thereof commencing on the 1 day of June 1948 . . ."

Q. That is for the whole term?

A. Yes sir.

Q. How long was your term?

A. Well, the term generally runs two weeks, three weeks including a grand jury. That is the usual schedule.

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Q. And so your record shows that your jurors were summoned then to appear on May 17th for the whole term?

(104) A. That is right.

Q. I thought you said the jurors were excused after the first week?

A. That is the ordinary practice I said.

Q. I don't want to know about the ordinary practice. I want to know what happened in this case, according to the record.

BY JUDGE MURPHY: We suggest that you have it copied into the record as is, the venire itself. As we understand it, it says they are summoned to appear for the term commencing on the 24th day of May 1948; and, as we understand it, the Zietz trial did not occur that week at all.

BY MR. MARGIOTTI: No, but the pressure of the term makes some difference.

BY JUDGE MURPHY: If you are talking about "term," it may be civil cases. The Zietz case was a week before Darcy. That was May 24. Maybe Foster and Zietz lasted two weeks; I don't know.

BY MR. MARGIOTTI: I am going to withdraw you as a juror. Can you check and find out when these venires were issued tonight and bring that information with you tomorrow morning?

BY JUDGE MURPHY: Find out if there was a venire issued for the week of the Foster-Zietz trial. If so, when? Was there a separate venire issued for the Darcy trial? If so, when?

BY MR. MARGIOTTI: May we ask that question, that is whether any jurors for the week of the Foster-Zietz trial—not jurors that were—on that case were held over?

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(105) BY THE WITNESS: I see what you mean.

BY MR. RYDER: On Foster I would suggest that Mr. Margiotti ought to have the sheriff here.

BY JUDGE MURPHY: Except the venire is signed by the Court, isn't it?

BY MR. RYDER: I suppose the venire is but I presume the sheriff carries it out.

BY JUDGE MURPHY: The venire would be issued and signed by the Judge, and they have in these courts, as everyone knows in the law, they have jurors for civil trials and they have jurors for criminal trials, and apparently this gentleman has read from Page 329 of the Oyer and Terminer Criminal Docket 1943 to — Bucks County as follows:

"May Term A. D. 1948

Bucks County, SS.

In the name and by the authority of the Commonwealth of Pennsylvania

Honorable Hiram H. Keller President of the Seventh Judicial District, consisting of the County of Bucks, by virtue of said office, justice of the Courts of Quarter Sessions of the Peace and Oyer and Terminer and general jail-delivery, for the trial of capital and other offenses in and for the said County.

To the Clerk of the Courts of Quarter Sessions of the Peace and Oyer and Terminer and general jail delivery of the County of Bucks, greeting:

(106) We order and direct that you issue a venire to the Sheriff and Jury Commissioners of Bucks County, aforesaid, commanding the said Sheriff and Jury Commissioners to empanel, and the said Sheriff to summon, a traverse jury in the Courts of Quarter Sessions of the Peace and Oyer and Terminer.

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and general jail delivery, consisting of 120, qualified according to law, to make up the jury requisite to inquire of and perform all those things which on our part shall be enjoined upon them, at the term thereof to be held at Doylestown, in and for the County of Bucks, commencing on the 17 day of May A. D. 1948, next after the date of this precept, to serve for the term thereof commencing on the 24 day of May A. D. 1948, dated at Doylestown, this 12 day of April A. D. 1948."

Now then, on Page 331 of the same book there is a different venire ordering the jury to commence their services on the 1st day of June 1948.

You take it up from there, General.

BY MR. MARGIOTTI: All right.

Q. Mr. Schroeder, what is that entry that the Court has just read, the venire for June 1, 1948? —

A. Well, that is the second week of the traverse jury for that particular May term 1948. They were summoned to appear on the —

Q. Would that be the jury that would be—of which the Darcy jury was selected?

A. Which date is the Darcy trial started, or do you have it?

(107) BY JUDGE MURPHY: You agree it was started on June 7.

BY MR. MARGIOTTI: It started on June 7.

BY JUDGE MURPHY: The following week.

BY MR. MARGIOTTI: The following week, on Monday, June 7.

BY THE WITNESS: This starts on the 1st day of June.

BY MR. MARGIOTTI:

Q. Would that jury be there for two weeks or three weeks or how long?

A. According to the docket entry, this jury starts service on the 1st day of June 1948.

Q. And for how long?

A. To serve for the term thereof.

Q. And how long was the term?

A. I don't know how long the term lasted; I can't tell; it is too far back.

Q. Do you know how long your criminal term is for in Bucks County?

A. As I say, they usually last three weeks, one week of grand jury, two weeks of traverse jurors. That is the usual way.

Q. My experience has been in some of the small courts they last three months; in big cities it lasts 30 days. I have known none shorter than 30 days.

BY JUDGE MURPHY: We understand the question we are confronted with is Bucks County at the time in question.

(108) BY MR. MARGIOTTI: Exactly. I think a big county has four terms.

BY JUDGE MURPHY: The practice, according to what has been told to the Appellate Court in this case, was a different panel each week. Now whether there was a different panel, we would like to know. According to the Court, they say there was an entirely different panel.

BY MR. MARGIOTTI: May we excuse this witness?

BY MR. RYDER: We are willing to allow the witness to be excused providing we have the right to cross-examine him.

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BY JUDGE MURPHY: Al right, the witness is to come back in the morning. He is to find out what he means by the term, venire by the President Judge; when was the venire issued for the week of the Foster-Zietz trial; when was the venire issued as to the Darcy trial; and when they were summoned in each respective week?

BY MR. MARGIOTTI: And were any of them held over?

BY JUDGE MURPHY: Do you understand?

BY THE WITNESS: I don't have no way of getting home. I live 116 miles from here. I was brought up by a man.

BY JUDGE MURPHY: If you are going to that expense, we suggest you arrange with Mr. Margiotti.

BY MR. MARGIOTTI: (109) Since counsel's expense is going to Washington —

BY JUDGE MURPHY: That is neither here nor there. Counsel asked this witness to take a trip of 100 miles, working for you, to get that information. The question is who is going to pay it?

BY MR. MARGIOTTI: We will pay it if we have to. I would sooner have the Commonwealth pay a half of it.

BY THE WITNESS: Furthermore, I don't know if I am in position to get—I don't know what the situation will be in Doylestown when I get there, so far as getting this information, whether the sheriff's office will be open, whether I have access —

BY MR. MARGIOTTI: The District Attorney can get

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that information over the phone. If he gets it and reads it into the record, I will agree to it. That will save me a few dollars.

BY MR. RYDER: I doubt that all of the information Mr. Margiotti desires can be obtained over the phone. The Court House closes promptly at 4:00 o'clock. It will not be opened again until 9:00 o'clock tomorrow morning. As I understand it, these matters are matters that are probably in the hands of the sheriff, certainly as to the actual time the summons went out.

BY JUDGE MURPHY: There is nothing before the Court. We understand that the request has been made that the witness be withdrawn from the stand with the right to recall him tomorrow, to which the Commonwealth has no objection.

(110) (Witness excused)

REVEREND FRANK J. DAMROSH, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Reverend, where do you live?

A. Doylestown.

Q. How long have you lived there?

A. Eighteen and one-half years.

Q. Were you there during the trial of Foster-Zietz and Darcy?

A. I was.

Q. Did you—I see you are a minister. May I ask you what church?

A. St. Paul's Episcopal Church.

Q. St. Paul's Episcopal Church. And where is your church located?

A. Oakland and Pine Streets, Doylestown.

Q. State whether or not you became acquainted with any of the boys mentioned.

A. I did.

Q. Which one or ones?

A. Harold Foster.

Q. You didn't become acquainted with Darcy?

A. No more than a nodding acquaintance. I didn't have any chance to converse with him.

Q. Do you remember the time that Darcy's case came up for trial?

A. I do.

Q. At that time had Zietz and Foster's trial been held?

A. Well, my recollection is that it was the week before.

Q. All right; now are you acquainted with the people in and about Doylestown and Bucks County in a general way?

A. Well, after living eighteen years in a place you get to know a (111) good many people.

Q. Yes, you would. Reverend. And will you state whether or not on the June 7 that Darcy was placed on trial whether you were acquainted with the expressions of the public of Bucks County concerning Darcy?

A. That is a hard question to answer specifically, because I also—I was as acquainted with it as anybody else and in particular, more so.

Q. Did you hear people express themselves concerning the Feasterville killing?

A. Well, of course.

Q. And these people whom you heard express themselves—where were they from with reference to the County?

A. Well, as I have already said, my acquaintance is chiefly in and around Doylestown, and naturally more with the people of my own parish than with others. I would hesitate to make any specific answer to your question because I wouldn't know just what people I had talked to in that period.

Q. Were they generally from around Doylestown or further out in the County?

A. Doylestown and within a radius of some 10 or 12 miles, I would say.

Q. Reverend, what would you say was the feeling existing at that time?

BY MR. VAN ARTSDALEN: That question is objected to, calling for a conclusion.

BY JUDGE MURPHY: Well, we will take it subject to the objection.

BY MR. MARGIOTTI: What was the objection?

(112) BY JUDGE WATSON: Well, he just objected any way.

BY MR. MARGIOTTI: Just objected; all right.

BY THE WITNESS:

A. Would you repeat the question?

BY JUDGE MURPHY: What time?

BY MR. MARGIOTTI: At the time of the trial.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

BY MR. MARGIOTTI: At the time Darcy was placed on trial.

BY THE COURT: The Court has made a request. Repeat the question as amended.

(Question read as amended as follows: "Q. Reverend, what would you say was the feeling existing at that time, at the time Darcy was placed on trial?"')

BY THE WITNESS:

A. I couldn't possibly after the interval of years that has elapsed try to pin down my recollections as to what reactions I heard at what specific times.

BY MR. MARGIOTTI:

Q. Well, can't you tell—do you have any idea when you got do you know what the reaction was of the people?

A. My answer is the same. I remember reactions throughout this episode beginning from the time of the murder up through the (113) trial, a period of a considerable number of months. I couldn't possibly sort out impressions and pin them down to any given point of time.

Q. Well, at the time that Foster and Zietz were being tried the impressions from the public any time before the time?

BY JUDGE MURPHY: Do you understand that question?

BY THE WITNESS: I understand it.

I simply repeat I have impressions of things that were said

to me both in my parish and people outside of it during the course of this episode, but I can not pin down any of those recollections to specific dates.

BY MR. MARGIOTTI:

Q. From what date did you continue to have these impressions?

A. What did you say?

Q. Up until what date did you continue to have these impressions without pinning them down to any specific time?

A. I am sorry to be unable to answer questions. The same answer goes. They are still going on. Every time anything appears in the paper about this case you meet people and you get remarks. My impressions of this case are spread over a period of some six years or more, and I can not be more specific than that.

Q. Will you state whether or not those impressions have been the same during that period?

A. Yes; in general I would say yes.

Q. Will you state now what was the public opinion during that period?

BY MR. VAN ARTSDALEN: That is objected to what the public opinion may be after (114) the trial was held.

BY JUDGE MURPHY: We will take it subject to the objection.

BY THE WITNESS:

A. I don't feel qualified to make a statement under oath as to what the public opinion was in the town. I can only answer specific questions about, let's say, if you asked me where I got

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these opinions from specifically, or something like that. But I am not qualified to make an answer which would commit me to say that I thought public opinion as a whole was so and so. I am not qualified for that. I can't say. I can only say what the personal impression was I received from specific persons.

BY MR. MARGIOTTI:

Q. Did you come to any conclusion yourself as to whether there existed in Doylestown and Bucks County any prejudice against this defendant?

BY MR. VAN ARTSDALEN: That is objected to.

BY JUDGE MURPHY: As of when?

BY MR. MARGIOTTI: At any time during the six years.

BY JUDGE MURPHY: The objection is sustained.

If you will pin-point, we will allow it, but you are over a long period now.

(115) BY MR. MARGIOTTI: I withdraw the question.

Q. Did you come to any opinion—just answer this question yes or no without stating anything about it—did you come to any opinion as to whether or not there was any prejudice in Bucks County against this defendant, Darcy?

A. I would like—before I answer yes or no to that question I would like an answer to this question of my own: What do you mean by "prejudice"? If you ask me feeling, indignation, reactions and so on, I can give an answer but what do you mean by the word "prejudice"?

BY JUDGE MURPHY: We think the proper question—

BY MR. MARGIOTTI:

Q. Personal feeling of animosity, personal feeling of guilt against him; personal ~~feeling~~ the nature of the trial he should have.

A. I can. You are asking me what my personal opinion was of the ~~situation~~ and I will say that it was—there was very great indignation, a great deal of feeling of antagonism towards the defendants and a general feeling that they were all guilty. Now that I can say is my opinion of that, but the word "prejudice" I would not be willing —

Q. When did that feeling begin, as you have stated?

A. I have already said I can not be pinned down as to dates. I would say it began when the murder was first committed when the news first broke.

Q. How long did that continue—up to the present time?

A. Yes.

BY MR. MARGIOTTI: (116) That is all.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Reverend, were you in Doylestown during the week of the Darcy trial and also during the prior week of the Foster-Zietz trial?

A. I was.

Q. Did you attend any of the hearings in the Court at that time?

A. I attended a portion of one session of the Zietz-Foster trial; none of the Darcy trial.

Q. You don't recall which particular session that was, do you, Reverend?

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A. I do not.

Q. Now you have stated, I believe, that there was a feeling of great indignation. Would you say there has been a feeling of great indignation in other serious criminal offenses that have been committed?

A. Yes.

Q. Would you say that there was any greater or stronger feeling about these cases than other important criminal cases?

BY MR. MARGIOTTI: We object until we know what cases are involved.

BY JUDGE MURPHY: The objection is overruled. We are in a wide field now, the state of mind in a community.

BY THE WITNESS:

A. I would say that there are occasional cases which arouse an equal indignation. If you want me to be specific, I can refer to the Kapps case. But I would also say that with the exception—with the possible exception of that, I can recall no other case in 18 years in Bucks County that aroused the state of (117) feeling that that one did.

BY MR. MARGIOTTI: Which one?

BY THE WITNESS: This Darcy-Zietz-Foster case.

BY MR. VAN ARTSDALEN:

Q. Now a great deal of the state of public opinion you have referred to referred to things that occurred after the case was tried?

A. I have already answered I can not and I do not intend

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under oath—intend to specify what impressions I got before during and after the trial. I can't after six years sort those things out and I shouldn't attempt to.

Q. Father, were there any unusually large crowds in and about Doylestown during the time of that trial, or do you recall?

A. I do not recall.

Q. I take it, Father, that your recollection of the things that occurred in Doylestown during the actual week of the Darcy trial are somewhat hazy at this time, is that correct?

A. I wouldn't say that, no. I remember specifically that there was naturally more talk, more discussion, more argument about the case while the trial was going on than either prior or since it. All I can say is I would not attempt to pin down my recollections of things that was said to me to any one period.

BY MR. VAN ARTSDALEN: That is all.

BY JUDGE MURPHY: You have said there was a general feeling that they were all guilty; you have also said there was an antagonism towards (118) the defendants. Was there any violence shown in the community toward them?

BY THE WITNESS: Not to my knowledge.

Your Honor, I may say, so far as my testimony is concerned, it is naturally based mostly on the reactions within my own parish, the conversations that I had, partly as the result of the things which I said probably about the case, and I measure my recollection largely from that although, as I said before, I did also talk to a number of other people.

BY JUDGE MURPHY: Are you aware of anybody going anywhere near the Courthouse with guns or clubs or making any disturbances during this trial?

BY THE WITNESS: I am not.

BY JUDGE MURPHY: Did you hear of any such thing having occurred in that community?

BY THE WITNESS: Not to the best of my recollection.

BY JUDGE MURPHY: Well then, if there was a general feeling and if there was an antagonism towards the defendants and great indignation, was it apparent in any way except vocally and perhaps a display of emotion?

BY THE WITNESS: That is all. From my personal knowledge, I don't know of anything having happened. But I know of no other type of (119) display.

BY JUDGE MURPHY: I might say for the record I am asking these questions more in view of the situation in Moore v. Dempsey and Frank v. Mangum.

Is the witness excused by both gentlemen?

BY MR. MARGIOTTI: Yes sir.

(Witness excused.)

BY JUDGE MURPHY: It is now two minutes to four. We will adjourn until 10:00 o'clock tomorrow morning.

(Court adjourns for the day.)

→ (Court resumes on March 12, 1954, with all parties, including the Relator, David Darcy, present in Court.)

MR. WALTER SCHROEDER, recalled.

DIRECT EXAMINATION (Continued).

BY MR. MARGIOTTI:

Q. Mr. Schroeder, when you left the stand yesterday afternoon you were to make an effort to get some information which we were interested in. Did you get that information?

A. I got all I could of it. I got the venire and the precept of the jurors for this particular term of court.

Q. May I have those? What did you say you have here?

A. I have the precept of the grand jury and then there were traverse jurors for that particular term of court; May sessions 1948.

Q. Now I see. Will you produce now for me—at least identify the venire for the week that Zietz and Foster were tried, which one is it?

A. The 24th of May. This is the Zietz-Foster jurors.

(120) Q. And the one of June 1, what is that?

A. That would be the Darcy group of jurors for the traverse.

Q. You don't have copies of those, do you?

A. No sir, I do not. The sheriff's office would have copies.

Q. Well for the present we will use these.

(Exhibit marked "Relator's Exhibit No. 6"; Exhibit marked "Relator's Exhibit No. 7.")

BY MR. RYDER: There is a question concerning their admission into evidence. I am going to make an objection on the ground these are original records of the Court of Oyer and Terminer of Bucks County. While we may have no objection to the admission of certified copies, we certainly object to the admission of original records. It seems that is going pretty far

to allow a litigant to offer in evidence original records of the Court of Pennsylvania —

BY JUDGE MURPHY: Is that your only objection?

BY MR. RYDER: Yes. So far as admissibility otherwise is concerned, we would have no objection.

BY JUDGE MURPHY: Your objection is overruled. Certainly there is no reason why if the records of any court in the world that were subject to the process of this Court that add any light on the question to be decided—no reason why they shouldn't be produced. However, in order that the records of the Court may be available for the use of that Court it is quite possible that photostatic copies could be substituted, or certified copies could be substituted.

BY MR. RYDER: (121) I made that suggestion in the course of my objection.

Now we have the same objection to the transcript of testimony offered yesterday in the case of Foster and Zietz and also Darcy. It was my understanding at the time—it wasn't my understanding at the time that those were the original records of the Court of Oyer and Terminer. Now the Court has before it, as I recall, a copy of the notes of testimony taken down in the course of the trial of Darcy —

BY JUDGE MURPHY: Yes, supplied by the Commonwealth.

BY MR. RYDER: Yes, supplied by the Commonwealth. We have no objection to the substitution of that copy for the original, but we are confronted with exactly the same problem which I mentioned with respect to these exhibits, the venire —

BY JUDGE MURPHY: What we have here is a fundamental problem. For years and years it was the practice of the Appellate Courts to insist upon one seeking justice, or to seek a review of what occurred in the lower court, for him to go to the expense of hundreds and perhaps thousands of dollars to reproduce, and the Third Circuit have a rule that to obviate the necessity of such great expense you can bring up the original record, and this record in the hands of this Court will be properly and adequately protected and we don't think there should be the necessity of having it typed over again and making copies of perhaps thousands of pages of testimony. It will be protected while it is in the hands of this Court.

BY MR. MARGIOTTI: At this time I offer in evidence "Relator's Exhibits Nos. 6 and 7."

(122) BY JUDGE MURPHY: Identified as —

BY MR. MARGIOTTI: Identified as an order to the sheriff and jury commissioners of the County to call certain jurors —

BY JUDGE MURPHY: "No. 6," order being dated for identification —

BY MR. MARGIOTTI: Being dated April 12, 1948, and requesting the jurors to appear on the 24th of May 1948. And "No. 7" is dated the 12th of April 1948, requesting the jurors to appear on the 1st day of June 1948 at 10:00 o'clock in the forenoon of that day.

BY JUDGE MURPHY: It would look from those dates if that was carried out that the jury that was going to try the Darcy case was ordered to appear the week previous to the case being called. Certainly it would be something that ought to be

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clear, whether or not they did appear on the 1st of June whereas the case was not called until the 7th of June and whether or not they were in the Courtroom during the Foster-Zietz trial. Go ahead.

BY MR. MARGIOTTI:

Q. Do you know when these jurors did appear?

A. No, I do not; I don't remember.

BY MR. MARGIOTTI: Your Honor, I have here in my possession the original order signed by Judges Keller and Boyer with reference to the jurors on the 24th of May and the 1st of June directing them in the name of the authority of the Commonwealth to summon said jurors.

I think, in order to shorten the record, Mr. Ryder (123) and I can agree as to what it contains thereof. Is that satisfactory?

BY JUDGE MURPHY: Judge Watson has made what I think is an excellent suggestion that if counsel feel it is material as to when these people appeared, certainly in that courthouse there are report records and pay records. If they were there they certainly looked for their pay.

BY MR. MARGIOTTI: I had that in mind.

BY JUDGE WATSON: This isn't any help to us at all.

BY MR. MARGIOTTI: The witness has told me the sheriff himself is going to be here who knows those facts.

BY JUDGE MURPHY: The sheriff would certainly have nothing to do with the pay of the jurors.

BY MR. MARGIOTTI: But he knows when those jurors appeared.

BY JUDGE MURPHY: The best evidence would be the pay records unless he is going to take each one and say he remembers when 120 jurors appeared.

BY MR. MARGIOTTI: I think that suggestion is very excellent and we will try to get it.

If the Court please.—

(Exhibit marked "Relator's Exhibit No. 8"; Exhibit marked "Relator's Exhibit No. 9.")

BY MR. MARGIOTTI: (124) If the Court please, I offer in evidence "Relator's Exhibit No. 8" and "Relator's Exhibit No. 9."

BY JUDGE MURPHY: What about "6" and "7"?

BY MR. MARGIOTTI: They have been offered.

BY JUDGE MURPHY: They have not been offered. They have been identified.

BY MR. MARGIOTTI: I thought I offered them.

BY JUDGE MURPHY: I don't think so.

BY MR. MARGIOTTI: If I didn't offer them, I offer them now.

BY MR. RYDER: I object on the grounds stated before. They are the original records of a Court of record of the Commonwealth of Pennsylvania. We have no objection if the

Court please, to the introduction of certified copies of those exhibits.

BY JUDGE MURPHY: All right. "Relator's Exhibits Nos. 6 and 7" will be received in evidence with the understanding since they consist of only two pages that photostatic or certified copies may be substituted in lieu thereof.

BY MR. MARGIOTTI: If the Court please, we offer in evidence "Relator's Exhibits Nos. 8 and 9," which are the original orders of the Court to the sheriff to summon the jurors for the 24th day of May 1948 and June 1, 1948.

BY MR. RYDER: (125) Same objection as to the previous offers.

BY JUDGE MURPHY: Same ruling with the understanding that certified copies or photostatic copies may be substituted in lieu thereof.

BY MR. MARGIOTTI:

Q. You may put that in your pocket.

BY JUDGE MURPHY: Don't put anything in your pocket that you have read the contents thereof.

BY MR. MARGIOTTI: I told the witness to put a paper in his pocket and I want the Court to see what that paper was. Your Honor raised a question about it. It is a direction to call grand jurors. I didn't think it was important in this case. You had —

BY JUDGE MURPHY: Will you let me see the indictment, please?

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Now then, Mr. Margiotti, you have called to the Court's attention the order of the Court signed April 12, 1948, calling the grand jury to meet on May 17, 1948. But the indictment is dated in February.

BY MR. MARGIOTTI: That is correct.

The reason I called it to your attention is merely to show it had nothing to do with this case.

BY JUDGE MURPHY: You state the grand jury referred to in the paper read was a grand jury that had nothing to do whatever with this case.

BY MR. MARGIOTTI: That is right.

(126) BY MR. MARGIOTTI:

Q. Do you know, Mr. Schroeder, who in your County would have a record—ordinarily it is the Treasurer of the county; I wouldn't assume it is that way in your County—the record of pay to the jurors?

A. At the conclusion of their service the record and vouchers for pay are submitted to the Treasurer and after he pays them I believe he sends all the papers over to the Controller of Bucks County, Mr. Howard Krupp. They should be in the possession of the Controller of the County right now.

Q. So that all of the records now would be in the hands of the Controller?

A. Yes sir.

Q. Who is he?

A. Howard Krupp.

BY JUDGE MURPHY: Did you in May—in June 1948 and May 1948 have a system when the jurors come in that

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they have some kind of card that is stamped or punched to show whether they are present?

BY THE WITNESS: Yes sir, we do.

BY THE COURT: And are those cards turned in at the time they normally get paid for their attendance?

BY THE WITNESS: Yes sir.

(127) BY JUDGE MURPHY: And are they kept in the records?

BY THE WITNESS: No, we have a voucher slip and we put on the days and date. We give it to the juror. We tell them to go down to the Treasurer and get their pay.

BY MR. MARGIOTTI:

Q. What does the juror do with the card?

A. It isn't a card. It would be like a pay voucher showing the man's name, days and dates he served. That was to be signed by the Chief Clerk of the office and given to the juror to take down to the Treasurer and collect his money.

BY JUDGE MURPHY: Is it punched every day he appears?

BY THE WITNESS: We have a roster, list of attendance records. When Court opens each day his name is called and checked off. We work off that record to show days on the voucher. He goes down to the Treasurer and gets his money and we take an affidavit for every attendance on this here attendance list and we send that down to the County Treasurer.

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After he makes his report he sends it up to the Controller of the County.

BY MR. MARGIOTTI:

Q. Do you have any personal knowledge—listen to the question—do you have any personal knowledge whether or not any of the jurors summoned for June 1st appeared on that date and remained for any part of the Foster-Zietz trial?

A. I don't remember that part. They just reported but I don't know whether they were in on the trial or not.

BY JUDGE MURPHY: (128) Do you have any recollection of any one of them reporting on June 1st, personal recollection that they did in fact report? No wild guesses; we want facts.

BY THE WITNESS: I would have to look at the record.

BY JUDGE MURPHY: If you know, say so; if you don't the answer is you don't know. Which is it?

BY THE WITNESS: I don't know.

BY JUDGE MURPHY: It would certainly appear, Mr. Margiotti, somewhere in that courthouse there is a record of what happened.

BY MR. MARGIOTTI: I feel certain that you are correct. I call Your Honor's attention to the fact that in the Relator's exhibit of the docket entries —

BY JUDGE MURPHY: Exhibit number —

BY MR. MARGIOTTI: Pardon me!

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Q. Do you know whether there is a record kept in a regular docket of the Oyer and Terminer Court of Bucks County of the jurors as to the date they appear?

A. The list of jurors would be in there, sir, in the docket there showing that they were present on June 1st as summoned by the sheriff.

BY JUDGE MURPHY: What clerk's office do you work in—the Prothonotary or the Clerk of Courts?

(129) BY THE WITNESS: Clerk of the Quarter Sessions, Oyer and Terminer.

BY THE COURT: Is that the kind of an office where this record is kept?

BY THE WITNESS: That is right; yes sir.

That docket should show when they appeared for that particular time. The docket will show when the various traverse jurors appeared. It is in there in black and white.

BY MR. MARGIOTTI:

Q. I am going to show you the criminal docket for the Oyer and Terminer of Bucks County. Would you mind coming here. Is that a record kept in your office?

A. That is a record kept in our office.

Q. Will you state whether or not on Page 331 there is a reference to when the jurors which were summoned for June 1st were called—appeared?

A. Yes sir —

BY MR. VAN ARTSDALEN: I object to that. I think the record will speak for itself.

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BY JUDGE MURPHY: The objection is sustained. The record is the best evidence. The Court will interpret the original record instead of this witness.

BY MR. MARGIOTTI:

Q. Now then, on June 1st—the first day of June was a Monday, wasn't it?

A. Yes sir; I believe it was.

Q. And on that date the Zietz-Foster trial was still going on?

A. Yes; I believe it was.

(130) Q. Now when the jurors report in your County—reported in your County at that time where would they report?

A. They report to the traverse jury room, it is situated in the basement of the courthouse, to one of the tipstiffs in charge of that particular department where they get assigned to lockers and given numbers —

Q. Given numbers —

A. Locker numbers.

Q. Was that done with the jurors that appeared there on June 1?

A. I believe it was.

BY JUDGE MURPHY: Do you know, sir? Not what you believe. Were you down there and did you have anything to do with it?

BY THE WITNESS: No sir.

BY JUDGE MURPHY: Don't say you know if you don't.

BY MR. MARGIOTTI:

Q. If you know, say so; if you don't, say so. All we want is

the facts no matter who it helps or hurts. But if you don't know, don't state you know. Do you know what happened to these jurors that appeared on June 1st?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. Do you know whether or not they remained about the courtroom or were dismissed and left?

BY MR. VAN ARTSDALEN: I object.

(131) BY JUDGE MURPHY: The objection is sustained. You are assuming the first fact. Find out if he knows. He doesn't know if they appeared or if they remained.

BY MR. MARGIOTTI:

Q. Do you know if they appeared or whether they remained there?

A. I do not.

BY MR. MARGIOTTI: If the Court please, we offer in evidence from the original record, Oyer and Terminer Criminal Docket, Bucks County, under the page of 331 what appears with reference to the return of the jurors—what appears with reference to the list of jurors summoned and returned by the sheriff for the May Term, second week, under date of June 1st.

BY JUDGE MURPHY: Let me ask this question. Is there anything to show how many weeks the May Term consisted of?

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BY MR. MARGIOTTI: There isn't so far, Your Honor.

BY JUDGE MURPHY: Could it be there was a list of jurors for the 24th and one for the 1st and one for the 7th?

BY MR. MARGIOTTI: No, I don't think so.

BY JUDGE MURPHY: Well, the records are the best evidence.

BY MR. MARGIOTTI: That is what I am going to do.

If the Court please, the reason I identified it that way is that on this record there appears the name of Harry T. Westlake (132) that I referred to yesterday, who is on this list.

BY JUDGE MURPHY: You offer in evidence Page 331 do you?

BY MR. MARGIOTTI: 331 and 332.

BY MR. RYDER: We object on the ground that is an original record of the Court of Oyer and Terminer of Bucks County. We have no objection to the introduction of certified copies.

BY JUDGE MURPHY: The objection is overruled. The book as is will be received in evidence with reference only to the pages designated by Mr. Margiotti as well as to show the Court if it has to make an independent examination of its own whether or not there was a term. But we think that burden should fall on counsel. If counsel meets the burden then we will permit the substitution of pages, and if they don't meet the burden, in the cause of justice we will pursue it ourselves.

BY MR. MARBIOTTI: At the same time I offer in evidence some pages, Pages 329, 330, with reference to the jurors called as of May 24th only for the purpose of showing the way these records are kept and showing that these jurors were called on that date —

BY JUDGE MURPHY: I want to make the statement we are quite aware the burden is upon the Relator but the ultimate question is what occurred there.

So that the record will be clear, give the book an exhibit number.

BY MR. MARGIOTTI: (133) Yes.

BY JUDGE MURPHY: You haven't given it one yet. I assume it will be your "No. 10."

May we suggest to the Reporter that he add some kind of paper instead of mutilating the book in any way. Use some kind of paper just to identify it for the record as "Relator's Exhibit No. 10."

(Exhibit marked "Relator's Exhibit No. 10.")

BY JUDGE MURPHY: What about the offer he made about the other two pages?

BY MR. RYDER: What page numbers?

BY JUDGE MURPHY: Mr. Margiotti has made an offer of Pages 331, 332, 329, and 330.

BY MR. RYDER: I would make the same objection.

BY JUDGE MURPHY: You object on the ground they are the original records.

Walter Schroeder—Direct

BY MR. RYDER: Yes sir.

BY JUDGE MURPHY: We will receive the four pages and book in which they are included with the understanding that if it is clear to the Court at the close of the case or during the course of the case that we have the situation as that book reflects it for the May Term or whatever term was embraced the week of the Zietz-Foster trial and the Darcy trial, then we will permit certified copies or photostatic copies of those four pages and those alone.

BY MR. MARGIOTTI:

(134) Q. Mr. Schroeder, as Deputy Clerk of Courts—you are, aren't you?

A. Yes sir.

Q. As Deputy Clerk of Courts don't you have a record as a clerk in your office of the term of your Courts, when they begin and when they end, particularly your Criminal Courts, your Quarter Sessions and Oyer and Terminer?

A. Yes, we do.

Q. And that is fixed by order of the Court?

A. Yes, it is.

Q. Do you have that with you?

A. No, I do not have any here.

Q. Can you get a copy? Is there anyplace here that contains a copy of the order of the Court fixing the duration of the criminal terms?

A. The only thing would show it would be a Court calendar for the year 1948, a Court calendar showing the various terms of court, when they started.

Q. Do you have a Court calendar with you?

A. I don't have a Court calendar for 1948, no sir.

Q. For any year?

Walter Schroeder—Direct

A. I changed clothes. I failed to move it from my pocket into this coat.

Q. You changed clothes?

A. That is correct.

Q. You can get the original record —

BY JUDGE MURPHY: We understood counsel to tell the Court that as of June 1st the name of Westlake appears; is that what you said?

BY MR. MARGIOTTI: Yes sir.

BY JUDGE MURPHY: (135) June 1, No. 29 that Westlake was identified before; he was identified as No. 29, Harry T. Westlake; and No. 29 is Robert H. Clarendon.

BY MR. MARGIOTTI: I am sorry about this.

BY JUDGE MURPHY: Let's have no mistakes about it. You read what it says on Page 33b and No. 29 is not Westlake. Let's have no mistake.

BY MR. MARGIOTTI: I don't think there is any mistake. I don't think there should be any mistakes.

BY JUDGE MURPHY: There shouldn't be.

BY MR. MARGIOTTI: Here's what I have been referring to, Your Honor.

BY JUDGE MURPHY: Let's see where you find the name of Westlake in that book.

BY MR. MARGIOTTI: Here it is. Harry T. Westlake is Juror No. 118. He would have No. 118 as being summoned

Walter Schroeder—Direct

but when he was called as a juror he would have another number. I think that explains it.

BY JUDGE MURPHY: Let the record note on Page 332 there is a Harry T. Westlake following No. 118.

BY MR. MARGIOTTI: Judge, on that same list, according to the Clerk's record, which is "Relator's Exhibit No. 4," appears the name of W. D. Pardoe "Sworn and seated in the box as a Juror," and on that list of the Prothonotary Pardoe is No. 16 as a juror in the Darcy (136) case. I don't know what his number would be on that list.

If the Court please, I call the Court's attention for the purposes of this record that Juror No. 1 sworn as a witness—as a juror in the Darcy case was listed as No. 16 in the Clerk's record and we find him No. 90 on Page 332 of the docket which we have just introduced in evidence and marked as "Relator's Exhibit No. 10."

BY JUDGE MURPHY: No. 1 juror is No. 16 on what exhibit?

BY MR. MARGIOTTI: It is No. 16 on "Relator's Exhibit No. 4."

BY JUDGE MURPHY: On "No. 4."

BY MR. MARGIOTTI: And No. 90 —

BY JUDGE MURPHY: And No. 90 on Page 332 of "Exhibit No. 10."

BY MR. MARGIOTTI: That is right.

No. 2, Anna W. Bueher, is No. 20 on "Exhibit No. 4" and No. 8 on Page 331 of "Exhibit No. 10."

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And Marvin D. Weidner is No. 21 on "Exhibit No. 4" and is No. 116 on Page 332 of "Exhibit No. 10."

Jessie H. Horne is No. 33 on "Exhibit No. 4" and No. 46 on Page 331 of "Exhibit No. 10."

Oliver C. Landis is No. 38 on "Exhibit No. 4" and No. 66, Page 331, of "Exhibit No. 10."

Franklin T. Fretz is No. 46 on "Exhibit No. 4" and No. 41, Page 331, of "Exhibit No. 10."

(137.) Roger Mason is No. 49 on "Exhibit No. 4" and No. 70, Page 332, of "Exhibit No. 10."

Howard Price is No. 52 on "Exhibit No. 4" and No. 85, Page 332, of "Exhibit No. 10."

L. Calvin Fluck is No. 63 on "Exhibit No. 4" and No. 35, Page 331, of "Exhibit No. 10."

Elva A. Shive is No. 66 on "Exhibit No. 4" and No. 102, Page 332, of "Exhibit No. 10."

Ruth G. Bliss is No. 70 of "Exhibit No. 4" and No. 9, Page 331, of "Exhibit No. 10."

And Anne L. Reed is No. 77 on "Exhibit No. 4" and No. 91, Page 332, of "Exhibit No. 10."

Now the alternate jurors are as follows: William F. Hicky is No. 79 of "Exhibit No. 4" and No. 49, Page 331, of "Exhibit No. 10." Virginia Brillman is No. 81 of "Exhibit No. 4" and No. 14, Page 331, of "Exhibit No. 10."

BY MR. MARGIOTTI:

Q. Now I want to ask you, Mr. Schroeder, if any jurors were held over from the previous panel—would there be a record of that and how would it be kept?

A. Yes, there would be a record if any jurors were held over from the previous panel. There would be a record. We would make up another attendance record for the following week and

have the jurors all spread and their numbers and check them off in the usual way, and that would be kept.

Q. Where would you get that record?

A. That would be in the Controller's office showing payment.

Q. Showing payment?

A. Yes.

(138) Q. That would be in the same classification of other jurors where you spoke of using the Controller's office for their records?

A. Yes sir; that is right.

Q. Would you or would you not have a notation in "Relator's Exhibit No. 10" if any of the jurors were held over just like you have a notation the jurors did not answer to their names?

A. I just don't understand counsel.

Q. Come here a minute. You see this notation here?

A. Yes sir. "The following were..." —

Q. Wouldn't you have also a notation, "The following jurors were held over"?

A. Well, all these that weren't excused were held over. Out of this group of jurors in this particular group these were excused and all these others were held over to be drawn on this particular jury or separated to be in other Courts for other criminal matters.

Q. I mean by "held over"—let's not have any confusion here between the meaning of a term. What I want to know is whether any of the jurors that were called for May 24 had their services extended to and beyond June 1st except the jurors that were on the Foster-Zietz trial.

BY MR. VAN ARTSDALEN: I object. The record speaks for itself.

BY MR. MARGIOTTI:

Q. If you know.

A. I don't know.

Q. If they did, where would you get that information?

A. That would be on record in the Controller's office.

Q. And you would make no notation of that in your record, "Exhibit (139) No. 10" if that were the case?

A. You refer to the docket —

Q. Yes.

A. It wouldn't be noted in the docket. It would be noted on our Court minutes for that term of court.

Q. Do you have the Court minutes here?

A. I do not.

Q. In other words, if any jurors were held over from the previous panel to and beyond June 1 it would be in those minutes too?

A. That is correct.

Q. Now I want to clear up one thing, and that is the method by which jurors are selected in a homicide case—were selected in this homicide case —

BY MR. VAN ARTSDALEN: I object unless this witness has personal knowledge.

BY JUDGE MURPHY: The objection is sustained on the ground we have the very record itself. If you want to contradict the record, all right. We have the voir dire here.

BY MR. MARGIOTTI: You have what?

BY JUDGE MURPHY: We have the transcript and voir dire here in both cases already in evidence.

BY MR. MARGIOTTI: What I had in mind —

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BY JUDGE MURPHY: You mean how the jury commissioners or the Court —

BY MR. MARGIOTTI: No, I don't mean that, I mean this, whether the jurors (140) were put in a room and called in one by one and examined, and if selected, went into the jury box —

BY JUDGE MURPHY: Were you the Clerk in either the Zietz-Foster trial or the Darcy trial; that is the courtroom Clerk?

BY THE WITNESS: No sir, I was not.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. Were you in at the time the jury was selected in either trial?

A. I was not.

Q. Who was the Clerk that was in that room?

BY JUDGE MURPHY: If you know.

BY MR. MARGIOTTI:

Q. If you know.

A. Matthew L. Godshall.

Q. And was he the Clerk or a Deputy Clerk?

A. He was the Clerk of the Court of Oyer and Terminer at that time.

Q. I see. Do you know where he is now?

A. No, I don't.

Walter Schroeder—Cross

Q. Where was he when you last heard of him?

A. He is a businessman in Doylestown operating a grocery and a butcher store.

Q. O.K. And was he acting as Clerk for both of those cases?

A. Yes sir.

BY MR. MARGIOTTI: All right; you may cross-examine.

(141) CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Schroeder, this is the docket which is typewritten, is that correct?

A. That is correct.

Q. Now this docket is typewritten sometime after the proceedings are actually had in court, is that also correct?

A. That is right.

Q. The docket is transcribed by one of the Clerks in your office, is that correct?

A. Yes sir.

Q. And it is transcribed from minutes taken in longhand by the particular Clerk sitting in the courtroom?

A. That is right.

Q. I believe you said you were not present in the courtroom during the Darcy trial?

A. That is right.

Q. Nor were you present in the courtroom during the Foster-Zietz trial?

A. That is right.

Q. Now, Mr. Schroeder, during 1948 the criminal terms lasted, I believe you stated yesterday, for three weeks, is that correct?

A. No, I don't believe I made that statement.

Q. All right, let me ask you this, sir: There was first a grand jury that convened during May 1948, is that correct?

A. That is right.

Q. And the week immediately following that, the week of May 24 —

A. That is right.

Q. — was the beginning of the Zietz-Foster trial, is that correct?

A. That is right.

(142) Q. Now then, for that particular week there were 120 jurors selected or called, is that correct?

A. That is right.

Q. Now the week of—commencing on—the Darcy trial commenced on June 7, is that correct?

A. That is right.

Q. And the jurors that were summoned to appear for that week, do you know whether any of them had been summoned to appear for the previous week or any of the previous week?

A. I don't know.

Q. Mr. Schroeder, on the docket—on Page 331 of the docket that has been offered in evidence it appears that the "List of traverse jurors summoned and returned by the sheriff to the May Term of Criminal Court A. D. 1948. (Second Week)," that does appear, does it not?

A. That is right.

Q. And the 120 names that are listed after that were the jurors that were called for the week of the trial of the Darcy case, is that right?

A. I would have to look at the Darcy —

BY JUDGE MURPHY: What do you mean by "Second Week"?

BY MR. VAN ARTSDALEN: That is what appears in the docket.

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BY JUDGE MURPHY: Read what it says.

BY MR. VAN ARTSDALEN: "Eo Die—List of traverse jurors summoned and returned by the sheriff to the May Term of Criminal Court A. D. 1948. . (Second Week)."

BY MR. VAN ARTSDALEN:

(143) Q. Now, Mr. Schroeder, will you come down here again, please? On Page 332 at the end of the names of the 120 jurors there appears: "Eo Die—The second week traverse jurors having been called, all answered to their names but the following," is that correct?

A. That is correct.

Q. Mr. Schroeder, you were served with a subpoena, were you not?

A. Yes sir.

Q. And in that subpoena you were requested, I believe, only to bring—read the subpoena as to what you were requested to bring.

A. All papers filed in or comprising the complete record in the case of Commonwealth v. Harold Foster, Harry Zietz and David Darcy entered in the Court of Oyer and Terminer, Bucks County, Pennsylvania, No. 37 February Term 1948, including without limitation the transcript of testimony taken upon the trial of Zietz and the respective voir dire examination of the jurors—

Q. And did you bring all that material with you to the Court today?

A. I brought them to Court yesterday.

BY MR. VAN ARTSDALEN: That is all.

BY MR. MARGIOTTI: That is all for the present.

Walter Schroeder—Cross

BY JUDGE MURPHY: There has been a request for the man, who is a Deputy in the Clerk of Courts who is now in Scranton apparently at his own expense, to get information in other offices. Now do you or don't you object?

BY MR. RYDER: I object.

BY JUDGE MURPHY: If the Commonwealth objects we will make this observation, (144) that he is the defense counsel's witness and whether he wants to volunteer here to do it for you that is between you and him.

BY MR. MARGIOTTI: We will pay him. I am only asking him to get whatever information in his own office.

BY JUDGE MURPHY: That wasn't your request yesterday.

BY MR. MARGIOTTI: That is my request today. I am not a mind reader. It developed this morning and I don't know those things.

BY JUDGE MURPHY: That is between you and Mr. Schroeder.

(Witness excused.)

Rev. William Babinsky—Direct

REVEREND WILLIAM BABINSKY, called and sworn on behalf of the Relator, on direct and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. VAN ARTSDALEN: If the Court please, we respectfully ask for an offer.

BY MR. RYDER: May I suggest that the record show the presence of the Relator in Court?

BY JUDGE MURPHY: We have asked that the presence of the Relator be noted and we are going to reiterate the Relator was present yesterday morning when we commenced the proceeding, when we took a recess and resumed again he was present, when we took the noon recess and resumed at 2:00 o'clock he was present until we adjourned yesterday and he has been present from the time we commenced this morning, and we will now direct the Reporter at each and (145) every time the Court recesses or adjourns that when we resume the presence of the Relator, if he is present, be placed on the record and if he isn't present, the Court's attention be called to his absence.

BY MR. RYDER: Yes sir.

BY MR. MARGIOTTI:

Q. Reverend, where do you reside?

A. I reside now at Ridgewood, New Jersey.

BY JUDGE MURPHY: Just a minute! There has been a request for an offer and we take it there must be some reason

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and we will ask this one question. Were you a resident of Doylestown or of Bucks County in May or June 1948?

BY THE WITNESS: I was a resident of Bucks County at the time.

BY JUDGE MURPHY: What is your reason for the request for the offer?

BY MR. VAN ARTSDALEN: We wish to ascertain whether the offer extends to conditions that may have existed subsequent to the time of the Darcy trial or whether it relates to the Darcy trial itself. As we understand the opinions—the per curiam opinion of the Court, the only question that can be involved so far as goes, is the alleged atmosphere of hysteria and prejudice prevailing at his trial, and we wish to limit the evidence to that issue.

BY JUDGE MURPHY: Your request for an offer is denied. You may develop it.

(146) BY MR. MARGIOTTI:

Q. Reverend, in December 1947 where were you living?

A. I was living at Feasterville, Pa., at the time.

Q. Do you know where the Feasterville Inn was located?

A. I do.

Q. And how far from the Feasterville Inn did you yourself live?

A. A quarter of a mile or so, roughly speaking.

Q. Did you know Mr. Kelly, who was killed?

A. I did.

Q. And what is the denomination of your church?

A. The Reformed Church of America, colloquially called The Dutch Reformed Church.

Rev. William Babinsky—Direct

Q. And how long had you been in Feasterville?

A. I was in Feasterville from April 1945 until November 19, 1952.

Q. And where have you been since that time?

A. At Ridgewood, New Jersey.

Q. And before you went to Feasterville where did you live?

A. I lived at High Bridge, New Jersey.

Q. I see. Are you—do you have a charge in New Jersey?

A. At present I am pastor of the Old Paramus Reformed Church in Ridgewood, New Jersey.

Q. Were you in Feasterville the day of the killing?

A. I was.

Q. Will you state whether you were there at the time of the trial of Foster-Zietz and Darcy?

A. I was there at one time. I do not recall the exact day.

Q. What do you mean by being there at one time?

A. I went up one day out of curiosity.

Q. To the Court?

(147) A. Yes sir, to the Court.

Q. You were in the Court during that time?

A. In the County, yes sir.

Q. Will you state whether or not in connection with your duties as minister you became acquainted with the people in your community?

A. Yes, indeed, I did become acquainted with a great many.

Q. With a great many people?

A. Yes sir.

Q. Members of your parish or otherwise?

A. Members of my parish and many, many people in other parts of the parish. It was called the Community Reformed Church. Therefore, my relationships were with the community as a whole.

Q. Will you state whether or not you know—strike that. State whether or not you engaged in conversations with people

in Bucks County concerning the Feasterville robberies and killing from the day it occurred until the Darcy trial—until and during the Darcy trial. ———

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: Were there two robberies or was the one in the other town?

BY MR. MARGIOTTI: What was that?

BY JUDGE MURPHY: I am wondering about the proof. The first robbery was at Feasterville; the other a half hour later was where—in Feasterville?

BY MR. MARGIOTTI: (148) Not Feasterville.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY JUDGE MURPHY: That can be answered yes or no.

BY MR. MARGIOTTI: Following His Honor's suggestion answer it yes or no. That was the intent anyhow.

~~BY THE WITNESS:~~

A. Yes, I did engage in conversations.

BY MR. MARGIOTTI:

Q. In those conversations did persons express themselves concerning the defendants, particularly Darcy?

A. Yes, they did express themselves.

Q. And will you state whether or not these expressions were few and far between or whether there were many of them?

A. I would say that conversations relating to this whole episode were going on all the time, so far as I could ascertain, from the time of the commission of the deed until and after the trial. It was a constant sort of thing, a very lively topic of conversation.

Q. And from these conversations that you had with various persons will you state whether you are in a position to tell the Court what the feeling was, if any, for or against Darcy at the time of his trial?

A. Well, I think the people —

BY MR. VAN ARTSDALEN: I object. That contemplates a yes or no answer.

BY JUDGE MURPHY: (149) We will let him answer and explain.

BY THE WITNESS:

A. Repeat the question, please.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY JUDGE MURPHY: First answer that yes or no.

BY THE WITNESS:

A. Yes, I am in a position. I think so.

BY MR. MARGIOTTI:

Q. What was that feeling at the time of Darcy's trial?

BY JUDGE MURPHY: When did Darcy's trial occur?

BY THE WITNESS: Darcy's trial occurred the week of June 7.

BY MR. MARGIOTTI:

Q. Answer the question now.

A. Now my answer, of course —

Q. Answer the question and explain it all you please.

A. I would say the prevailing —

BY MR. VAN ARTSDALEN: I object for the purpose of the record and object to all other questions calling for an opinion of the witness as to the feeling of the people in the community.

BY JUDGE MURPHY: We will permit thorough cross-examination of this witness.

BY THE WITNESS:

A. The prevailing sentiment of the community, as far as the defendants (150) are concerned, was a sentiment against them. Now that is a very general statement. That could be amplified.

BY JUDGE MURPHY: Go ahead. If you can amplify it, do so.

BY THE WITNESS: Well, I engaged in many, many con-

Rev. William Babinsky—Direct

versations on this subject. People talked to me very, very readily, because I knew the Kelly family and was very active in the community and I was stopped innumerable times and talked at gas stations, grocery stores, post offices, on the street with many, many people, and I gathered from my conversations with these people that they were very much biased in favor of condemning the defendants. Now the reason I say that is because I recall very vividly some conversations—I can not point to direct people, I talked to so many, but I can recall some of the very vivid impressions upon my mind. I remember that everybody was saying—now I say everybody was saying, people to whom I talked—everybody was saying that “The boys don’t need a trial; the boys should be condemned to death.” I remember them saying “They shouldn’t have any mercy.” I remember all kinds of rough statements of that kind before, during and after the trial. Now I think that would amplify what I meant when I said there was this feeling that went beyond the bounds of indignation.

BY MR. MARGIOTTI:

Q. Reverend, did you have anything to do with Mr. Kelly, the deceased?

A. I was the clergyman who officiated at his burial.

Q. You officiated at Mr. Kelly’s burial?

A. Yes sir.

Q. And from the opinion expressed by the public against Darcy (151) and the other defendants, will you state whether or not in your opinion the defendant could get a fair and impartial trial in Bucks County unaffected by the prejudice which you have related?

BY MR. VAN ARTSDALEN: I object

BY JUDGE MURPHY: The objection is sustained. That is for the Court.

BY MR. MARGIOTTI: All right, Your Honor. I wanted to ask it in order to get it on the record.

BY JUDGE MURPHY: It has been asked.

BY MR. MARGIOTTI:

Q. Now do you recall any other—were there any expressions of threats or violence?

A. Well, there were no expressions of threats or violence in the sense that anybody was going to organize against the defendants, no, but there were the expressions of people saying "I think they ought to be hanged," "I think they ought to be shot," or "I think they ought to be stamped out like bugs." I heard that.

BY JUDGE MURPHY: What "like bugs"?

BY THE WITNESS: "Stamped out like bugs."

BY MR. MARGIOTTI:

Q. How was—could you tell us whether or not you observed any change in the degree of feeling after the Foster-Zietz trial and just before the Darcy trial, or not?

A. I can not answer that conscientiously. I can not particularize the answer to that extent.

(152) BY MR. MARGIOTTI: You may cross-examine.

Rev. William Babinsky—Cross

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Reverend Babinsky, you say you came to Bucks County in April 1945, is that correct?

A. Yes sir.

BY JUDGE MURPHY: Just one minute! It is time for the usual ten-minute recess. It is 28 minutes after.

(Recess.)

(Court resumes after the recess with all parties including the Relator, David Darcy, present in Court.)

REVEREND WILLIAM BABINSKY, recalled.

CROSS-EXAMINATION (Continued).

BY MR. VAN ARTSDALEN: I move to strike out the testimony of the witness concerning what other people may have said to the witness about the case of Zietz-Foster and Darcy.

BY JUDGE MURPHY: We will let it stand subject to the objection.

BY MR. VAN ARTSDALEN: Thank you, Your Honor.

Q. Reverend, where is Feasterville in relation to Doylestown?

A. I would say it is —

BY JUDGE MURPHY: I may say for the record it would appear to the Court and certainly if this were any trial in which the Court presided, in its twenty-five years of practice, if this came out, de novo we would not allow it, but in view of this Mandate—just what (153) the pertinency of it is I don't know—but in order to comply with the mandate we will place it in the record subject to the objection.

BY THE WITNESS:

A. Well, roughly, about fifteen miles from Doylestown.

BY MR. VAN ARTSDALEN:

Q. And Doylestown is the county seat of Bucks County, is that correct, Reverend?

A. Yes sir.

Q. Now during 1948 do you know what the population of Feasterville was?

A. I did not know accurately the population of Feasterville at that time. It was a growing community.

Q. Of course. Could you give us an approximate idea of the population of Feasterville in 1948, in May and June 1948?

A. We worked on a township basis there so that I know there were about 1,000 to 1,200 voters registered there during that period.

Q. That is in the township itself?

A. In the township. Now in Feasterville I would judge the population might have been 1,500.

Q. And do you know what the population of the County of Bucks was, or do you have any idea?

A. None whatever.

Q. What was the total number of your parishioners, if I may use the expression?

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A. At the time 1948 —

Q. May and June 1948.

A. You don't mean by that the membership of the church necessarily because parishioners would embrace a lot more than that.

Q. What about the membership of your church itself?

(154) A. It might have been at that time roughly perhaps 150, roughly.

Q. And how many regularly attended church, can you give us any idea at that time?

A. At that time it would be very difficult for me to remember. I would say roughly perhaps 100 per Sunday.

Q. Of course, that included men, women and children you are referring to?

A. No, that would not include Sunday School folks. That would include just the Sunday morning worship service.

Q. All right, sir. Now this offense occurred in Feasterville, did it not?

A. It did.

Q. It involved a holdup in one of the taverns there in Feasterville, is that correct?

A. Yes sir.

Q. You lived there from 1945 April until some time in 1952?

A. Toward the end of November 1952.

Q. Now during that period of time there were no other murders occurred in Feasterville?

A. To my knowledge. I do not recall any.

Q. Now, Reverend, you have mentioned that there was a great deal of conversation that took place concerning this case, is that correct?

A. That is correct.

Q. And when did those conversations first start?

A. They started the next morning.

Q. After the offense?

A. After the offense occurred.

Q. Now, did they—did you hear more conversation or less conversation as the time of the trial approached?

(155) A. Perhaps there may have been a little lull on the conversation while things were quiet after the offense. Then as the time of the trial approached I would say conversation mounted in intensity.

Q. And do you know how long it was from the time of his offense up until the time of trial of Darcy?

A. Yes, roughly, five months.

Q. This offense occurred just a few days before Christmas 1947, didn't it?

A. Yes sir.

Q. Now the persons with whom you talked about this, I assume, were people that you knew personally, is that correct?

A. Many of them would be; many of them would not be.

Q. Well, were they strangers to you?

A. In a group let's say, meeting at some casual place such as a gas station or post office there could be people there involved in conversation whom I would not know.

Q. What gas station and what post office are you referring to?

A. Feasterville.

Q. Only in Feasterville?

A. Yes sir.

Q. Now, you do not know, do you, whether any of those persons ever spoke to any of the members of the jury in the Darcy trial?

A. I do not know.

Q. You do not know, do you, whether any of these persons who you heard speak ever attended the Darcy trial?

A. I believe they did.

Q. You do not know that, however, do you?

A. I know some of them that did, yes sir.

Q. How do you know that, by what they told you?

(156) A. On one occasion I remember talking with people who went up there and heard parts of the trial.

Q. All right, sir. Now, you did not yourself go to any of the Darcy trial, did you?

A. Not the Darcy trial, no sir.

Q. Now, you did not yourself go to any of the Darcy trial so that you do not know of your own knowledge any one that attended any of the sessions of the Darcy trial, is that correct, sir?

A. I think that is correct.

Q. And any knowledge that you have concerning the Darcy trial was purely what you have heard other people say, is that correct, as to what occurred at the trial itself?

A. That is correct.

Q. You weren't in Doylestown during the Darcy trial?

A. Not during the Darcy trial.

Q. So that you don't know of any occurrence that may have occurred in Doylestown, in the courthouse or around the courthouse, is that correct?

A. Except through hearsay.

Q. Except through hearsay and —

A. Including news bulletins and so forth, of course.

BY MR. MARGIOTTI: What?

BY THE WITNESS: Including news bulletins and so forth, of course.

BY MR. VAN ARTSDALEN:

Q. Now, Reverend, you mentioned that one person that you knew of apparently had attended a session of the trial, who was that person, please?

A. Your Honor, may I ask you a question?

(157) BY JUDGE MURPHY: What is your question?

BY THE WITNESS: I believe I was called as a witness to testify to a prevailing climate of opinion.

BY JUDGE MURPHY: You have made statements under oath and you are being cross-examined about it. Answer the question.

BY THE WITNESS: May I have the question repeated?

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter.)

BY THE WITNESS:

A. Do you mean the Darcy trial or just the trials in general?

BY MR. VAN ARTSDALEN:

Q. The Darcy trial was the trial that I intended to refer to.

A. I don't believe that I mentioned that I knew any person that attended the Darcy trial. I used the word "trial" in general. Foster-Zietz, Darcy.

Q. Then you do not know any person that attended the Darcy trial, is that correct, sir?

A. Now I believe that question is very difficult for this reason. I know people that attended these trials and whether they attended all of them or parts of them or not I can't particularize the question to that detail.

Q. Well, may we go back then just a moment?

A. Yes sir, sure.

Q. You mentioned that you had conversations with certain people prior to the trial?

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A. Yes sir.

(158) Q. Now then, do you know or were you informed by any of those persons that spoke to you prior to the trial that they attended any of the Darey trial?

BY JUDGE MURPHY: Do you understand the question?

BY THE WITNESS: Just to see whether I understood your question clearly, you want to know whether I know anyone in particular who attended the Darey trial, that is to whom I have spoken——

BY MR. VAN ARTSDALEN:

Q. That is to whom you spoke about the case prior to the trial.

A. I could not say for certain that any one individual attended the Darey trial. I can give you the names of people I know who attended the trials.

Q. All right, sir. I take it then these people that talked to you prior to the trial you do not know whether any of them attended the trial, the Darey trial?

A. I do not know.

Q. All right. Now then, you mentioned that there was a great deal of conversation about these cases. Was there any differentiation between the cases of Foster and Zietz and Darey in the minds of the people?

A. I think there was not.

Q. And that—incidentally, there was another man involved in this crime, was there not?

A. Yes sir, there was.

Q. Do you remember his name?

A. Yes, his name was Capone..

Q. Now, can you tell us the names of any of the persons to

whom you talked prior to the trial? You mentioned previously one person said "They ought to be stamped out like bugs."

(159) A. I said I remember remarks like that. I remember that very vividly. It made a terrific impression on my mind. Which one of the people I talked made that statement, I couldn't truthfully remember.

Q. Can you recall when it was said?

A. Can I recall when it was said? I could not. It was sometime during the period.

Q. You say it was sometime during the period, do you know whether it was before or after the Darcy trial?

A. It was before.

Q. But you don't know how long before?

A. No, it may have been March; it may have been in April; it may have been in January or February.

Q. It may have been very shortly after the offense occurred, is that correct?

A. It is possible.

Q. Is it possible that it could have been in December 1947?

A. At that time, to the best of my remembrance, people were not talking about the trial and what should be done with these boys. To the best of my remembrance, they were just speaking in terms of the awfulness of it and so forth.

Q. In other words, there was a general feeling directed against the type of the crime rather than a personal feeling against any of these defendants?

A. I don't believe I could unqualifiedly agree with that statement.

Q. Can you unqualifiedly disagree with it?

A. I believe so, yes.

Q. Now then, will you explain?

A. Why, because in conversations with the people the names of the accused defendants would come up again and again.

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They would (160) say they thought, "There should be no mercy." "There should be no help," and so on. "They ought to be given the chair," and what have you, some for the extreme sentence, some for the limit sentence. I remember they made a deep impression on my mind.

Q. Can you give the names of any of those persons that gave you any of those statements at all?

A. Yes, I can.

Q. Will you give one?

A. I can. I can give you several of them. There was Stewart Reibman, commonly called "Reib."

Q. Where does he live?

A. Feasterville, Bucks County.

Q. When did you have a conversation with him?

A. Many, many times.

Q. When was the first time?

A. I believe I talked with him the day after the offense.

Q. Do you recall what he said about it?

A. I do not.

Q. Do you recall particularly anything he said to you in any conversation you had with him?

A. I do not know any of his particular words. I remember I engaged in conversation with him concerning this, and several others.

Q. And you don't recall any particular words he ever said to you about the offense, is that correct?

A. No, I can not.

Q. Can you give us the name of any other person with whom you had a conversation?

A. Morris Ferguson.

Q. Where does he live?

A. Feasterville.

(161) Q. What is his occupation?

A. He is a salesman.

Q. When did you have any conversations with him?

A. Now there again I can't give my conversations with him.

Q. Did you have conversations with him after the Darcy trial?

A. Yes.

Q. Did you have many with him after the trial?

A. Yes, indeed; he was a good friend of mine.

Q. Are you able to say—can you tell us of any particular conversation you had with that gentleman?

A. With Mr. Ferguson —

Q. Yes sir.

A. Not particularly just to pick out words. He was the man I went up to the trial with that I don't remember which trial it was even.

Q. Just a moment ago you said it was the Foster-Zietz trial. Do I understand you are not correct?

A. It was the Foster-Zietz trial.

Q. You are sure of that?

A. Yes sir, near the end of that trial.

Q. Any others you had a conversation with?

A. Earl Patterson.

Q. Where does he live, sir?

A. Feasterville.

Q. And do you know when you had a conversation with him?

A. I believe he was one of the ones I talked with immediately the day after it occurred.

Q. The day after it occurred —

A. And several times subsequent thereto.

Q. Do you know when was the last time you talked to him about the case?

A. I do not.

(162) Q. And what, if anything, did he say about the offense?

A. I do not recall the particular words. I remember the

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general things that were said because they made an impression upon my mind.

Q. Can you remember specific words that were said to you by anyone?

A. I can not. I can not conscientiously say I remember this man saying this and that man saying that.

Q. Can you recall the names of any other persons with whom you talked to about this case? When I say "this case" I am referring to both the Darcy and Zietz-Foster case.

A. Yes. I had very general conversations with so many men I could probably just say—bring in 100 names and I would say I talked with all of them.

Q. Now, Reverend, you have told us you did go to the trial one of the days of the Foster-Zietz trial; do you remember what day that was?

A. I do not.

Q. Was it during the calling of the jury?

A. It was near the close of the trial.

Q. It was near the close of the trial?

A. Right.

Q. Now, was it a day session or an evening session?

A. It was a day session.

Q. Do you remember what Judge was sitting on that trial?

A. I can not conscientiously say I remember.

Q. Why did you go up to the trial?

A. To see what was going on.

Q. Out of curiosity, is that correct?

A. Yes sir.

Q. You had no direct connection with the trial?

A. I did not.

(163) Q. Now then, was it a morning session or an afternoon session?

A. Morning and afternoon of that particular day.

Q. In other words, you went to both sessions?

A. Yes sir.

Q. Were you there when Court opened in the morning?

A. No sir. I was not. I remember that.

Q. Do you remember about what time you came into the trial?

A. Well, to fix the time of day. —

Q. Approximately.

A. I would say 10:30-ish.

Q. Were there people standing outside the courthouse?

A. Yes, there were; sure.

Q. How many?

A. A guess you would like —

Q. Your best estimate, sir.

A. Oh, I think there may have been twenty-five or thirty people.

Q. Did you come directly into the courtroom?

A. Yes.

Q. That was outside the courthouse, is that correct?

A. Yes, it was.

Q. Did you hear any of them say anything about the case as you came in?

A. No, we didn't pause long enough.

Q. What about in the hall to the main courtroom?

A. As I remember it, we came into Doylestown, parked our car and walked into the courtroom.

Q. Were there any large crowds outside the courtroom?

A. "Large crowd" is a very general term. There were a number of people around as there are on such occasions.

Q. Now when you came into the courtroom was the courtroom filled?

(164) A. To the best of my remembrance, it was.

Q. That was in the Zietz-Foster trial?

A. Yes sir.

Q. Were you able to find a seat?

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A. Yes; I remember that.

Q. Now during the day that you were there—we don't want to go into this too much—was there any commotion at all?

A. I don't remember any.

Q. Was there any disturbance?

A. I don't remember any.

Q. Was there any outburst?

A. I don't remember any.

Q. Did anyone get up and shout and make any disturbance of any sort?

A. So far as I can remember, no.

Q. Do you remember how the jury were brought in and taken out?

A. I do not.

Q. Did you see the jury come through the main courtroom or did they go out a side door on each occasion, if you recall?

A. I don't recall; I do not.

Q. In other words, during the day you were there at the trial except for the fact there were some spectators and the courtroom was filled, was there anything unusual about the trial of that case that you observed?

A. It was a trial. I have been in court before and I had seen them for Bucks County. I think there were more people there than usual in the courtroom and around the building.

Q. But with everything quiet and orderly?

A. I would say so, so far as I recall.

BY MR. VAN ARTSDALEN: (165) All right, that is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. In talking to these people in and about Feasterville would you say the people you talked to were from Feasterville or from some distance from Feasterville?

A. Most of the people I talked with were people from Feasterville or from the immediate environs of Feasterville.

Q. What would you call the immediate environs of Feasterville—within a radius of how many miles?

A. A mile or two or three; Langhorne, Southampton.

Q. Right in that area of Feasterville?

A. Yes.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

(Exhibit marked "Relator's Exhibit No. 11.")

BY MR. MARGIOTTI: I would like to offer—by agreement of the parties—we have agreed to introduce, subject to acceptance by the Court, "Relator's Exhibit No. 11," which is a map of Bucks County with a scale marked thereon, and it is apparently a map of the Commonwealth of Pennsylvania from the Department of Highways, only for the purposes of helping the Court in locating different sections of the County.

BY JUDGE MURPHY: Is there any objection?

BY MR. RYDER: We have no objection.

BY JUDGE MURPHY: (166) It will be received.

Mr. G. Cole Farrier—Direct

MR. G. COLE FARRIER, called and affirmed on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Farrier, where do you reside?

A. Byberry Road and Depue Street, Summerton, Philadelphia, Pa.

Q. What is your business or profession?

A. I am an attorney-at-law.

Q. You practice law in Philadelphia?

A. I do, yes.

Q. Admitted to the various courts of our State including the appellate courts?

A. I am, and also the Supreme Court of the United States.

Q. I want you to state whether you have held any public position in the City of Philadelphia.

A. For many years I was Chief Librarian and research man for the Supreme Court of Pennsylvania and then I went into the City Solicitor's office on January 15, 1920, and I resigned from that office on April 1, 1952, after having served as Senior City Solicitor for a greater part of the time.

Q. And, Mr. Farrier, are you acquainted with Bucks County?

A. I have lived in Summerton, which is right on the boundary line of Bucks County across the County line from Feasterville, since the 1st of August 1930 and prior to that time I had lived at 96 Bustleton Avenue in Bustleton.

Q. The last place you mentioned, is that in Bucks County or Philadelphia?

A. Bustleton is in Philadelphia County about three miles south (167) on Bustleton Avenue in Bustleton.

Q. In the practice of your profession or for any other purpose did you happen to become acquainted in Bucks County?

A. Yes, all my life practically I have been riding in and out on the Summerton train and about two-thirds of the people that ride on that train come from Bucks County. It is the end of the line for them. It is the nearest, quickest transportation into the city, and course I have—one of my sons married the daughter of a contractor who lives about one-fourth of a mile from this Feasterville tavern and my wife has many social connections up through there, and the result was—except for this bunch of outsiders that come in in the last two or three years—I was pretty well acquainted with whole neighborhood, and I live right on the boundary line. My bedroom window looks into Bucks County.

Q. Do you spend much time looking out the window into Bucks County?

BY JUDGE MURPHY: No; we will take long enough as it is.

BY MR. MARGIOTTI: I withdraw that.

Q. Will you state, Mr. Farrier, whether you had anything to do with the defense of any of the boys involved in the Feasterville killing?

A. I was counsel for the parents of Harry Zietz before the thing happened. They came in to my office and retained me immediately after it happened, and not being a member of the Bucks County Bar I took my matter up with my correspondent in Bucks County, Mr. Rubin, and arranged with Mr. Rubin to handle the physical trial of the case of Harry Zietz in Bucks County.

Q. Did you participate in the trial of Harry Zietz in Bucks County?

Mr. G. Cole Farrier--Direct

(168) A. I did not.

Q. Will you state whether or not you participated in the preparation of that trial?

A. I did. I felt it was best for the client to have a local attorney rather than an outside attorney to represent him in such an important case.

Q. Did you enter an appearance in behalf of the client in Bucks County?

A. I did not.

Q. What you did was to do legal work for him, then you turned over the results of your findings to Mr. Rubin?

A. In fairness to Mr. Rubin I would say I worked with him and that he did not merely fire the bullets that I prepared. We worked together.

Q. Yes. And in doing so will you state when you began—strike that. In doing so did that get you into Bucks County?

A. I am in Bucks County almost every day anyway.

Q. All right. Did your investigation take you into Bucks County?

A. Oh yes, surely.

Q. And in what particular location in Bucks County?

A. Well, up at the Feasterville tavern where there are three roads splitting there at the end of the Bristol Pike, and in among the people around through Feasterville that I know and at the garage where I have my car repaired, at the gas station where I buy my gas and have my tires changed. I did most of my business of a local character up through that area.

Q. Did you have occasion to do any other investigatory work in connection with the preparation of the trial of Zietz in Bucks County?

(169) A. Unquestionably, yes, I did.

Q. And did that take you, this other work, take you to other sections of the County?

A. Well, to Doylestown.

Q. To Doylestown. Did it take you anyplace else other than Doylestown?

A. Not for the purposes of the case, no sir.

Q. Now in connection with your work did you come in contact with the people of Bucks County?

A. I did.

Q. Did you hear them—did you engage them in conversation, or did they engage you in conversation, or both?

A. As soon as they found out I represented Zietz they engaged me in conversation and not politely either.

Q. Did you engage in many conversations or just a few?

BY MR. VAN ARTSDALEN: I object unless the time is specified.

BY MR. MARGIOTTI: I am taking before the trial.

BY JUDGE MURPHY: He wasn't retained until after the murder occurred.

BY MR. MARGIOTTI: And after the trial.

BY JUDGE MURPHY: At any rate, after the murder.

BY MR. MARGIOTTI:

Q. Go ahead.

A. I made it my business, as I do in most cases, especially in important ones, to get a personal knowledge of what happened at (170) the tavern and what happened to the people in the tavern, and I talked to a number of those people. Some of the people who were robbed were my clients. I went to see them and talked to them about it.

Q. You mean some customers who were involved in the Feasterville tavern?

Mr. G. Cole Farrier—Direct

A. Some customers who were involved in the Feasterville tavern were clients of mine in other legal matters and I went to see them and talked to them about it.

Q. Did you locate those people not connected with the Feasterville Inn, not connected with the owners, or customers?

A. Yes sir. You see, Mr. Margiotti, we ride along on a train —

BY JUDGE MURPHY: No, we will get along. You are a lawyer. The Court himself was a witness and he knows how lawyers are. Answer the questions.

BY THE WITNESS: Yes sir.

BY MR. MARGIOTTI:

Q. Will you state whether or not you talked to people going back and forth to work?

A. Yes, I did, on the train and at the railroad station while we were waiting for the train, coming home on the train.

Q. Did you talk to them at any other public place?

A. At the garage where I have my car repaired, at the gas station where I buy my gas and have my tires changed.

Q. Was that in Bucks County?

A. Yes sir, Bucks County, Feasterville.

Q. In these conversations did these people express themselves concerning their feeling against the defendants at the time of the trial, particularly at the time of the Darcy trial?

(171) BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it subject to the objection and say that normally it would be hearsay, that the testimony doesn't qualify in any manner with the requirements, but we have here a novel situation where we have been

directed by Mandate to find out what the sentiment was of the people of Bucks County, in that area. That is apparently where we are right now, and we will take it subject to the objection. Bucks County and thereabouts.

BY MR. MARGIOTTI: Read my question, Mr. Butler.

(Question read by the Reporter.)

BY THE WITNESS:

A. Frankly, I will have to qualify my answer to that because —

BY MR. MARGIOTTI:

Q. First answer the question yes or no and I will follow it up with something.

A. Yes, they did. I will have to explain that I can't recall the day, hour and minute that it was said to me, or even the week, but it occurred from time all through from the day after the murder until after Darcy's trial was finished and so on infinitum.

Q. Does that feeling still exist?

A. I don't know whether it is material. It certainly does.

Q. Let me ask you: What—from your conversations with these people what was the sentiment of the people against the defendant Darcy—and during the trial?

BY MR. VAN ARTSDALEN: T object.

BY JUDGE MURPHY: (172) We will take it subject to the objection.

Mr. G. Cole Farrier—Direct?

BY THE WITNESS:

A. Did you ask me for my opinion?

BY MR. MARGIOTTI:

Q. What was the sentiment of the people from the conversations they had with you?

A. From recent developments the public —

BY JUDGE MURPHY: No, you are now back in 1948, in June—May.

BY THE WITNESS: I was going to say I don't think I giotti seems to think. I can only tell you what people said to have such a good ability to analyze public opinion as Mr. Marme, what they did to me and what they said to each other. I am not going to give you my opinion as to what the sentiment was because I don't think I am capable of forming an opinion.

BY JUDGE MURPHY: You can give the facts upon which you formed an opinion or assumption.

BY THE WITNESS: The very treatment or conversations I heard, their statements made to me, "I was a louse for taking his case," for one thing. That is not so of everybody, that talked to me, but that remark was made to me, and I can give you the names of the people that made many of these remarks. Furthermore, "That these kids should burn," and "The only thing should happen to them was they should burn." That was said to me over and over again. That was said to my daughter at a dinner party two weeks ago.

BY JUDGE MURPHY: (173) Strike that out—your daughter talking at a dinner party.

Mr. G. Cole Farrier—Direct

BY THE WITNESS: — with respect to these boys.

BY MR. MARGIOTTI:

Q. Prior to the trial.

A. This is all prior to the trial except what the Judge has stricken out.

Q. Prior to the trial. We will have a little difficulty but stick to that, please.

A. Prior to the trial the general conversation, and it would happen everytime I got gas or got my car fixed, up through there even when I would stop in to buy a loaf of bread was "Are you still taking care of those kids?" "Are you keeping those murderers out?" "When are they going to burn?" "How long do you think you can keep them away from the hot spot?" Those were the kind of remarks made to me from time to time. Some of them, I will agree with you, were made facetiously because they liked to ride me. They knew me. I am one of the community. I am not expelled because of what happened. I am simply reprobated. But those things were said to me all during this time, and I haven't any doubt if the District Attorney wants to know names I will have them for him —

Q. You wait until he examines you. If he wants to know names, tell him. On the conversations you had on that train that ends there and goes down to Philadelphia —

A. I didn't understand the question.

Q. Conversations with the people on the train; what happened on the train?

A. The very opinion and expression of opinion was not repeated over and over again, but almost everybody when I rode the train (174) did tell me at some time or another between the murder and the trial "I think your boy should burn." "I think they all should burn." That seemed to be the general impression of the people that had nothing to do with the actual occurrence.

Mr. G. Cole Farrier—Direct

Q. Were those people from Bucks County?

A. Those that I am speaking of, some of them were from Bucks County or in the immediate vicinity of the County line.

Q. Some of them could have been from Philadelphia?

A. Well, they may have lived a stone's throw on this side of the Bucks County line in Philadelphia.

Q. May I ask you this question—please don't answer this, there may be an objection—if there is, don't answer until there is a granting by the Court; you are to be guided thereby: From the expressions heard by you, will you state whether or not, in your opinion, the defendant Darcy could have at the time of his trial obtained a fair and impartial trial at the hands of the citizens of Bucks County? Don't answer that, please —

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: There is a question addressed to one of defense counsel. It seems the question is, what is before this Court and this Court must make the judgment. We will listen to facts but we don't think this man's opinion is proper evidence particularly in view of his previous testimony as well as the law. The objection is sustained.

BY MR. MARGIOTTI:

Q. Now that you have testified, will you state whether or not from what you heard—strike that. Did you read the newspapers?

A. I did.

Q. Will you state whether you read the newspapers published in (175) Bucks County?

A. I think I saw during all this period about one or two copies of some newspaper published in Doylestown and the Hatboro Spirit, which they have up at our drugstore on the corner.

Mr. G. Cole Farrier—Direct

Q. Did you read the Philadelphia papers?

A. Every day.

Q. Did they carry stories about this case?

A. They did.

Q. That is the metropolitan papers?

A. I don't know what you mean —

Q. The Inquirer, the Bulletin —

A. The Inquirer, News and Bulletin.

Q. Will you state whether or not you listened to the radio?

A. Radio —

Q. Yes.

A. Yes, I did.

Q. Did you hear any news comment on the radio?

A. I did, yes.

Q. Now from everything you read, heard and saw, from these various conversations that you said you heard, I want you to state now from that whether you yourself formed an opinion as to the sentiment in Bucks County concerning Mr. Darcy. Don't answer that.

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI: I will ask you another question —

(176) BY JUDGE MURPHY: We are sustaining this objection in view of this witness's previous testimony and we feel that if this is the measure of public opinion, in order to get a fair and honest appraisal we would have to have experts in public opinion analysis and have—how many thousand people live in that County?

Mr. G. Cole Farrier—Direct.

BY MR. VAN ARTSDALEN: We don't know but it is over 150,000.

BY JUDGE MURPHY: Over 150,000 people.

BY MR. MARGIOTTI: That is because of the steel mills there.

BY JUDGE MURPHY: I don't know anything about steel mills. The objection is sustained.

BY MR. MARGIOTTI:

Q. From what you have heard, read or saw, will you state whether you are now in a position to tell the Court was it your opinion this defendant could obtain a fair and impartial trial as is contemplated by the Constitution of the United States in Bucks County?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: Judge Watson feels we should sustain the objection. I feel we shouldn't sustain the objection and go into the question. I am going to sustain the objection because I think we are far afield. I believe it is the duty of counsel to present facts instead of the gentleman's opinion after reading an article in the Hatboro Spirit on one occasion. The objection is sustained.

(177) BY MR. MARGIOTTI: You may cross-examine.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Farrier, you took an affirmation here rather than an oath, is that right?

A. I did.

Q. And I take it that you are a member of the Society of Friends?

A. Society of Friends, Jenkintown.

Q. You yourself have a deep personal and moral conscientious objection to capital punishment, do you not?

A. I have.

Q. Do you still represent Harry Zietz?

A. I never represented Harry Zietz as Harry Zietz. I represented his mother and father and I simply pro forma represented them in appealing his case to the Supreme Court of Pennsylvania.

Q. But you did appear in the Supreme Court of Pennsylvania in the case of Harry Zietz?

A. I did appear in the Supreme Court of Pennsylvania in the case of Harry Zietz, yes.

Q. Mr. Farrier, on the appeal to the Supreme Court of Pennsylvania you made no claim of any hysteria in the community, did you; that issue was not raised there?

A. I did not raise it.

Q. As to the defendant whom you represented, Harry Zietz?

A. I did not.

Q. Now, Mr. Farrier, during the trial of Harry Zietz and Foster you were not present in Doylestown, were you?

A. I was not present in Doylestown, no.

Q. Were you present in Doylestown during any of the period of that (178) week?

A. I was not.

Mr. G. Cole Farrier Cross

Q. All right, now then during the week of the trial of David Darcy were you present in Doylestown at any time during that week?

A. I was not.

Q. So that you have no personal knowledge of anything that may have occurred in Doylestown during the weeks of the trials of both of Darcy and also of Zietz and Foster?

A. Only from the record.

Q. Only from the record?

A. Only from the record as made there.

BY MR. MARGIOTTI: What was that answer?

BY JUDGE MURPHY: Read the answer, Mr. Reporter.

(Answer read by the Reporter.)

BY JUDGE MURPHY: "Only from the record" I assume he means the transcript.

Well, it is now 12:30. We will recess until 2:00 o'clock.

(Recess.)

(179) (Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

MR. G. COLE FARRIER, recalled.

BY JUDGE MURPHY: Now then, we are in open Court. We want to state that we will be glad to hear from the witness on the stand any facts he may be able to offer which will aid this Court in coming to the conclusion as directed by the Mandate of the Circuit Court.

BY MR. MARGIOTTI: Mr. Farrier, have you stated—were you cross-examining?

BY MR. VAN ARTSDALEN: I was.

BY MR. MARGIOTTI: I withdraw that question.

BY JUDGE MURPHY: No. You have a right to continue on cross-examination.

CROSS-EXAMINATION (Continued).

BY MR. VAN ARTSDALEN:

Q. Mr. Farrier, you stated, I think, on this train you rode back and forth to Philadelphia approximately two-thirds were from Bucks County?

A. Those that got on at Summerton Station.

Q. Those that got on at Summerton Station?

A. Yes. Oh, naturally, people from Langhorne and stations down the line. I only knew a few of them. Our little group was a group from Summerton Station.

Q. Now, when did you first represent Harry Zietz after this offense occurred?

A. I never entered a formal legal appearance for him until I (189) entered it in the Supreme Court on the occasion of my entering an appeal from the decision of the Common Pleas Court of Quarter Sessions Court of Bucks County.

Q. You have stated you did make an investigation yourself into the facts surrounding the offense shortly after it occurred. Is that correct?

A. I was consulted by his mother and father immediately and on their behalf I immediately started to prepare myself to do something for this boy, if I could, to save him from the chair, if possible.

Mr. G. Cole Farrier—Cross

Q. It was in pursuance of your investigation a great many of these conversations took place, was it not?

A. On some occasions, perhaps one-half dozen, I went and made specific inquiries about the case. The other just came up ad lib.

Q. Did you tell those people of your interest in the case?

A. I had to. I couldn't ask questions about private affairs unless I had an interest to be served.

Q. So that you did tell them of an interest by you?

A. About five or six cases out of perhaps fifty such cases.

Q. Would you say it became generally known around the community of Feasterville you were interested in the case?

A. Among those I know.

Q. Weren't a lot of the conversations about the case directed to you because of your interest in the case?

A. Oh yes; surely.

Q. And you stated that some of the conversations that took place and some statements made to you were made facetiously—was that the term you used?

A. Those were from my friends with whom I have fraternal connections.

(181) BY MR. MARGIOTTE: What kind of connections?

BY JUDGE MURPHY: Fraternal.

BY MR. VAN ARTSDALEN:

Q. Did you talk to complete strangers about this case?

A. No, but they talked to me. I didn't even know their names.

Q. On what occasion?

A. Oh, going in on the train from time to time, waiting at the station or at the gas station, the garage where I was having my car fixed by McBride in Feasterville.

Q. At any time in Feasterville were there any mass gatherings or protests of any sort about this case?

A. I can't say that because I never attended any or did any come to my attention.

Q. So that none of them came to your knowledge, is that correct?

A. That is correct.

Q. You never observed any mass demonstration of any sort, did you, either in Feasterville or elsewhere in the County of Bucks concerning this case?

A. No. At the approach they ganged up on me. When there would be four or five engaged they would gang up on me, sometimes in a friendly way and sometimes in a hostile way.

Q. Were you ever threatened with any physical violence, you personally?

A. No. Since you have asked it, I was told "It wouldn't do me any good as a lawyer to take this case." I forget who said it. It was just suggested in innuendo in some of the conversations.

(182) Q. That was told to you by a friend, I take it?

A. Certainly not.

Q. You mean that was told to you by a stranger?

A. Why, somebody stated—he said "Cole, it won't do you any good as a lawyer to take this case; you'll lose business."

Q. There has been a great deal of discussion of this case since the trial, has there not?

A. I would like to forget it, yes. It has occupied a great deal of my time.

Q. Now you stated that during the trial, among other things you read the Hatboro Spirit, is that correct?

A. They have it up at the drug store. I would go up for a soda. I didn't buy it. I picked it up and looked at the headlines.

Q. Hatboro is not in Bucks County, is it?

Mr. G. Cole Farrier - Cross

A. It is in Montgomery County.

Q. The paper is not published in Bucks County?

A. It is distributed in Bucks County quite extensively.

Q. Not published there?

A. Not published there, no.

Q. Now during this trial do I understand you to say that you saw one or two copies of the Intelligencer?

A. I didn't remember the name. I saw one or two copies of the newspaper from up there. I was interested in knowing what was going on in the case. I went to a friend's house; he had it and I took a look at it.

Q. Is that the way you ascertained what was going on in the case?

A. No, I followed the Philadelphia papers on that.

Q. That is how you got the information as to what was going on in the case?

A. I know nothing of what happened at the trial except from the (183) stenographer's notes having examined the transcript.

Q. So that you were not conferring with Mr. Rubin during the trial of the Zietz case?

A. Only insofar as we discussed matters from time to time which are confidential.

Q. You also represented Harry Zietz before the Board of Pardons, did you not?

A. Yes; for a year or so, but I have not represented him since the last decision of the Board of Pardons. I have ceased to be his attorney although I still remain the attorney for his mother and father.

Q. Mr. Farrier, you have appeared and argued numerous cases before the Supreme Court of Pennsylvania?

A. I imagine about 200 cases altogether in my lifetime experience.

Q. Before the Supreme Court?

A. Before the Appellate Courts, the United States Supreme Court, and other places, the Supreme and Superior Court of Pennsylvania.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION

BY MR. MARGIOTTI:

Q. Mr. Farrier, you have been asked about the appeal in this particular case; you entered your appearance for Zietz in the appeal; did you have anything to do with the preparation of the briefs in the Zietz case before the Supreme Court?

A. I prepared them exclusively myself.

Q. Did you collaborate in the preparation of those briefs with Mr. Rubin whom you say tried the case?

A. The only thing I did was submit my final draft before I sent it to the printer to him to see if he had any suggestions.

(184) Q. Did you in any way refer to the nature of this trial in your briefs? You have been asked whether you raised the questions.

A. I did.

Q. What did you say?

A. Well, the record speaks for itself. I can only give you my recollection.

Q. Give us your recollection.

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. Where is that; do you have the record?

Mr. G. Cole Farrier - Re-direct

A. The briefs are in the possession of the Prothonotary of the Supreme Court of Pennsylvania for the Eastern District and what I said about this trial appears in that record, which is available to you or to the Court. I think it is a matter of record.

Q. Now you have answered that you did not raise a question of prejudice or feeling in the County. You have answered that question to the District Attorney who asked you that on cross-examination —

A. Might I say, Mr. Margiotti, that I was not present at the trial. I, therefore, had no chance to observe any prejudice that may have existed there at the time. Therefore, I overlooked it in arguing my appeal.

Q. You say you overlooked it?

A. Overlooked what I didn't know.

Q. Well, if you had the experiences that you have related here (185) in the Court to this Honorable Court, why didn't you raise the question?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take the answer. You, sir, are the one who started this. We will take the answer.

BY THE WITNESS:

A. I did not raise the issue because I did not know it existed not having been at the trial to get the actual knowledge of the surrounding circumstances.

BY MR. MARGIOTTI:

Q. All right. Now, Mr. Farrier, will you please state whether or not you have given to the Court all the facts that

Mr. G. Cole Farrier—Re-direct

you recall now that were brought to your attention before the trial that would have any bearing upon the feelings or expressions of the public, or have you missed something? I just want to know if you told it all.

A. I have revealed what happened to me, what I saw, what I heard and what has happened since—up to the time of the trial and since so far as I have been permitted to say what happened since the trial with respect to the proceedings in the Supreme Court and other places.

Q. Have you prior to the end of the Darcy trial given your experiences with the public?

A. Up to the present time —

Q. No, not up to the present time. Up to the end of the Darcy trial—from the date of the crime to the end of the Darcy trial have you covered it all?

A. There were some humorous things happened which I don't think (186) the Court will be interested in —

Q. You don't know what the Court will be interested in —

BY JUDGE MURPHY: Are you going to give us the humor since the trial?

BY THE WITNESS: No, before.

BY JUDGE MURPHY: You make an offer of the humor.

BY MR. MARGIOTTI: I didn't know that he said "humor."

BY JUDGE MURPHY: Yes.

BY THE WITNESS: What happened was this —

BY JUDGE MURPHY: Are you interested in that?

Mr. G. Cole Farrier—Re-direct

BY MR. MARGIOTTI: No.

BY JUDGE MURPHY: If you want to make an offer of the incidents, we will be glad to give you an opportunity to confer with the witness, but we will have an offer first.

BY MR. MARGIOTTI: I don't know what they are.

May I have the witness step down?

Q. May I ask you one question, to get away from the humorous end of this thing: These witnesses that you say talked to you that you have described—which you have stated what they said, do you know whether any of them attended the trials?

BY JUDGE MURPHY: Read the question, Mr. Reporter. (187) (Question read by the Reporter.)

BY JUDGE MURPHY: You used the word "witnesses."

BY MR. MARGIOTTI: Strike out the "witnesses."

Q. The persons you talked to, do you know whether they had appeared at the trial?

A. From an examination of the stenographer's notes of testimony in the Zierz and Foster case I know that some of them attended the trial for they appeared as witnesses in the transcript.

Q. Do you know on which side they appeared?

A. For the prosecution.

Q. Do you know in which case or cases?

A. I believe that one of them appeared in both cases; according to the transcript, as I recall. I didn't see the Darcy transcript so I don't know.

Q. Would you mind telling me the name of that person?

Mr. G. Cole Farrier—Re-direct

A. Morris Phillips—Morris Phillips was one of them. I have reason to believe he testified in the Darcy case although I don't know it as a fact.

Q. Is he the only one?

A. He is the only one whose name I can recall at the present time.

Q. Do you mean that there were others or that you don't recall there were others?

A. Well, I talked to others that were in the robbery where I didn't either know their names or knew them by their first names. In that case I am helpless to tell you—to identify them here.

Q. Was Morris Phillips one of your clients?

A. Yes sir.

Q. You said something about some of your clients being held up?

(188) A. Some of my clients that I represented in law cases were in the hold-up.

Q. And you remember particularly what one, Morris Phillips, said?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it.

BY THE WITNESS:

A. I don't remember the exact phraseology.

BY MR. MARGIOTTI:

Q. You don't have to be exact—the substance of the conversation.

A. Oh, the substance of the conversation was "These fellows ought to burn."

BY JUDGE MURPHY: Let me ask you, Mr. Farrier, was Mr. Phillips one of the men in the room when the shots were fired?

BY THE WITNESS: Yes.

BY JUDGE MURPHY: He thought the men that were in there during the shooting should burn; and he told you so?

BY THE WITNESS: Yes, in discussions at the Aders Gas Station.

BY MR. MARGIOTTI: If the Court please, if I may, I would like to place on the record that this witness was shown as appearing as a witness in the Darcy case; on Page 548 Mr. Philip Morris appeared as a witness.

BY JUDGE MURPHY: (189) Is it Morris Phillips or Philip Morris?

BY MR. MARGIOTTI: It is Morris Phillips.

BY MR. MARGIOTTI: That is all.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Now, Mr. Farrier, Mr. Phillips was one of the victims of the robbery, is that correct?

A. Yes sir.

Q. He stated to you an opinion that they "ought to burn?"

A. He made that remark to me when I stopped to get gas at his station.

Q. About when was that?

A. That was very shortly—that was very shortly after the murders.

Q. Did he make any distinction or differentiation between Zietz, Foster, Darcy or Capone?

A. He did to this extent, he says "Your boy fired the shot." That is the only thing I remember to differentiate. His opinion was generally the same as to all of them.

Q. And on the appeal which you took you raised no question, did you, about the testimony of Mr. Phillips at the trial of the Zietz case?

A. Heavens, no.

Q. Now you stated, I believe, also that on the appeal you didn't know about certain things and, therefore, you didn't raise this question or possible question of prejudice or hysteria, is that correct?

A. That is correct.

Q. You knew about all these conversations you testified to, didn't you?

(190) A. I certainly did and didn't blame them for holding those kind of opinions, if you want to know it.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION

BY MR. MARGIOTTI:

Q. Mr. Farrier, don't answer this question until the Court tells you to; Will you state whether or not you raised the question that the trial was unfair and partial? Don't answer that question.

There is no objection. Go ahead. Did you raise that question?

Mr. G. Cole Farrer Re direct

A. My brief in the Prothonotary's office and with the Supreme Court pointed out in what respects I thought that the trial was unfair, and I was honest and sincere in so contending but the Supreme Court, the majority of them, disagreed with me so I don't know that it makes any difference now.

BY JUDGE MURPHY: I might say that the Court will take judicial knowledge of the Supreme Court and the only one was 6 to 1. The one that dissented was on other two phases. We will take judicial knowledge of what the phases were, neither of which has been mentioned by this witness.

BY MR. MARGIOTTI: That is all.

BY JUDGE MURPHY: Sir, you have used the expression that they "ganged up" on you. We think that ought to be made clear. Who "ganged up" on you?

BY THE WITNESS: Why, I think the Court

Q 191 BY JUDGE MURPHY: First, when did they "gang up" on you?

BY THE WITNESS: It was sort of a periodical thing. It came along every time two or three or a half dozen got together. They would—I think the Court got a misapprehension of what I meant——

BY JUDGE MURPHY: We certainly did and we want no one to have misapprehensions; we want facts.

BY THE WITNESS: They would take the position that it was up to me to justify my position so they would make remarks.

Mr. G. Cole Farrier—Re-direct

BY JUDGE MURPHY: Were they friends or foes?

BY THE WITNESS: Both.

BY JUDGE MURPHY: How did the boys "gang up" on you? What did they do?

BY THE WITNESS: Well, they told me they sometimes used the remark they believed in the lex talionis.

BY JUDGE MURPHY: And by that you thought they meant what?

BY THE WITNESS: They wanted an eye for an eye, a tooth for a tooth.

BY JUDGE MURPHY: The Mosaic Law.

BY THE WITNESS: The Mosaic Law. Then they would enlarge on that.

(192) BY JUDGE MURPHY: Is that what you mean by "ganged up"?

BY THE WITNESS: Verbally. Some were kidding me, some were sincere. It was difficult for me to say who was sincere and who wasn't. At least they were displeased with what I was doing and they let me know it.

Will you ask me whether I am here under my own accord or whether I am here under subpoena?

BY JUDGE MURPHY: I think I ought to ask you that to show you were subpoenaed. You are here under subpoena?

BY THE WITNESS: I am, sir.

Mr. A. Russell Thomas - Direct

BY JUDGE MURPHY: From the defense?

BY THE WITNESS: From the defense. I want to make that clear.

BY JUDGE MURPHY: By defense you mean the Relator, Mr. Margiotti's client; at least his side has subpoenaed you here and that is why you are here?

BY THE WITNESS: Yes.

BY MR. MARGIOTTI: And you are here?

BY THE WITNESS: Yes.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

(193) MR. A. RUSSELL THOMAS, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Thomas, where do you live?

A. Doylestown, Pennsylvania.

Q. How long have you lived there?

A. About thirty-five years.

Q. A married man, I assume. Married?

A. Yes sir.

Mr. A. Russell Thomas Direct

Q. Will you state what your occupation is?

A. I am a newspaper reporter.

Q. For what newspaper?

A. Doylestown Daily Intelligencer and I have a News Bureau of my own that I represent the metropolitan papers.

Q. The Doylestown Daily ~~Intelligencer~~; and you are a reporter for the daily paper then?

A. That is right.

Q. At that time, the time of the Darcy trial, will you state whether it was a daily paper then?

A. It was.

Q. And had been before that?

A. That is right.

Q. For how long?

A. 425 years this July.

Q. Do you know what the circulation of your paper was at that time?

A. I have nothing to do with the circulation but I estimate about 6,500 daily.

Q. About 6,500 daily?

(194) A. About 6,500 daily.

Q. Will you state whether your subscribers your distribution was principally in Bucks County?

A. Principally so, yes.

Q. And what part of Bucks County does your paper reach?

A. Well, at that time it was pretty well spread; principally however, in the center, Doylestown, Newtown, part of Montgomery Valley and spread throughout the County; but mostly in the center of the County.

Q. I see. Some question has arisen here about the population of Bucks County in 1948, in June of 1948. Do you have any knowledge by census knowledge or otherwise of the population of that County at that time?

A. I don't, Mr. Margiotti. I wrote a story just recently about the increase in population. I couldn't say.

Mr. A. Russell Thomas—Direct

Q. As a newspaper reporter will you state whether or not you covered the Foster-Zietz trial and the Darcy trial?

A. I did.

Q. Covered both of them?

A. I did.

Q. Now I would like—at some point or another in this case we are going to give a description of that courtroom and I would like to develop it by you. How does the courtroom in Doylestown, say, compare with this one?

A. It is much larger.

Q. What is that?

A. It is much larger.

Q. How many courtrooms are there in the courthouse?

A. There are three. I don't know whether there were three at that time. I am not quite sure, but there are three now.

(195) Q. What was the large—where was the large courtroom located?

A. The large courtroom is located—after you enter the main entrance of the courthouse and walk in through the corridor you go into this large courtroom, which is one of the finest of its kind in Pennsylvania.

Q. Was it on the first or second floor?

A. It is on the first floor.

Q. It is on the first floor—

A. You walk down into an amphitheater to get into it.

Q. I see. Is that the courtroom in which the trials were held?

A. Yes.

Q. Both trials?

A. I think so. I am not quite sure. Well, I am almost sure; yes.

Q. As you walk in the—let's say you go in the main entrance to that courtroom, the public main entrance; I assume the public main entrance would be back in there?

Mr. A. Russell Thomas Direct

A. Yes.

Q. Now then, as you come in the main entrance what faces you?

A. The interior you mean —

Q. Yes. Give us a description.

A. On the right at that time there was the office of the Clerk of Quarter Sessions, a small office, and going down on the right was the Register of Wills.

Q. You mean in the courtroom?

A. As we are going into the court.

Q. In the courtroom?

A. In the courtroom.

Q. Yes.

A. What faces the courtroom when you get inside —

(196) Q. When you get into the courtroom you enter from the outside —

A. You go into a large courtroom. The bar of the Court is just ahead of you. The seats are in here.

Q. Just about the bench is here. Where was the jury box? Where was the jury box?

A. Well, we are coming in this way. The jury would be down here.

Q. In other words, it would be to the left of the Judge as Judge Murphy is sitting?

A. That is right.

Q. Where would the spectators sit?

A. Right back there where your people are now.

Q. Were there any seats back of the jury box?

A. Yes.

Q. For spectators?

A. For jurors.

Q. Were the jurors, I am talking about, back of where the jury was sitting?

A. They were. I think the jurors sat right in back of where

Mr. A. Russell Thomas Direct

the jurors were in the box. I don't think the spectators are allowed directly in back of them. The spectators sit in the middle aisle and on the other —

BY JUDGE MURPHY: I understand you to say there is a courtroom in Pennsylvania where jurors sit behind the jury box. Do you mean that?

BY THE WITNESS: Yes.

BY JUDGE MURPHY: You mean that the twelve jurors sat there; there are seats back behind so they can't see what is going on in the courtroom?

(197) BY THE WITNESS: Yes.

BY JUDGE MURPHY: Is that so?

BY THE WITNESS: Yes. Unless I am entirely wrong. There is a separation between — there is an aisle in between.

BY MR. MARGIOTTI:

Q. Here we are at the door entering the courtroom back here where that panel is —

A. All right.

Q. Is there an aisle leading up toward the bench?

A. That is right.

Q. You said it was a sort of an amphitheater?

A. Yes.

Q. You walk down the aisle?

A. Yes.

Q. It goes downgrade?

A. That is right.

Q. What have you to either side in the courtroom?

Mr. A. Russell Thomas—Direct

A. There is a railing that separates the front seats of the courtroom, the bench and where the attorneys' tables are—the jury is over on the one side, but this amphitheater goes the way around. There are jurors—when they call jurors in an ordinary case the jurors sit in back of the jury box. It is plain as day if you have been there.

Q. You mean on the right-hand side and left there are seats for the accommodation of the public?

A. That is right.

(198) Q. Does these seats on the right-hand side extend the rear of the jury box?

A. Right.

Q. How many rows of seats extend back there?

A. I don't know.

Q. Several rows?

A. Yes.

Q. Then your jury box is in front of those seats?

A. On the extreme side, yes, the jury—separate chairs are used in front.

Q. Would the box be like the jury box is here?

A. No, they are flat on the floor. There is no railing on the front.

Q. They are flat on the floor?

A. Right; black leather seats.

Q. Twelve or fourteen chairs—

A. That is right.

Q. —are all on the flat, not raised?

A. They are not raised.

Q. There is no railing in front of the jury box?

A. No.

Q. What separates the jurors from the spectators in back?

A. There is a railing, a wooden railing, and a partition back of that box.

Q. That could be occupied by the public?

Mr. A. Russell Thomas—Direct

A. There is an aisle where spectators can walk through, or lawyers, before you get to the jurors. If I make myself clear, there is an aisle where they can walk through there, it isn't up against—where if jurors are not called in the box they are not really up against. There is walking space that leads into the attorneys' room.

(199) Q. There is walking space between the seats occupied by jurors and spectators?

A. Yes sir.

Q. How long would you say that walking space is?

A. I don't know, but I imagine about 10 feet.

Q. What is on the opposite side of the courtroom? We will go over to the left.

A. Well, it is the same—spectators all the way around on the other side.

Q. Will you describe the position to the left of His Honor? I am going to take the position to the right of His Honor so we won't get confused.

A. On the right is a nice big fire-place —

BY JUDGE MURPHY: Could this possibly add any light?

BY MR. MARGIOTTI: It is going to later on.

BY JUDGE MURPHY: I mean the fire-place.

BY MR. MARGIOTTI: This is the fire-place. There is going to be some testimony describing the location of certain persons when certain things happened at the time. Otherwise, I don't think it makes any difference.

Q. Where does the lawyers sit?

A. Well, they are in back; in this lower semicircle there is a row of chairs and the lawyers—there is prisoners' row in back

of the Commonwealth bench or table, whatever you call it, which is prisoners' row and the lawyers sit in chairs to the right of (200) the Judge down in this front. There is a reporters' table also right on that right side and the spectators go all the way around then to the other end.

Q. Then there are places for spectators over in that end who are in full view of the jury?

A. That is right.

Q. Now then, there are chairs, you say, over in that end?

A. Yes.

Q. And reporters sit over there?

A. Yes, there is a table there, a table.

Q. Do you people sit at that table?

A. Sometimes.

Q. Then the defense table is between the reporters' table and the Commonwealth's table; is that right?

A. The defense table faces the Judge, to his left, and right to the left of the jury also, and the Commonwealth's table is directly opposite at a right angle there. I hope I make that clear.

Q. Mr. Thomas, how many sessions of the Foster-Zietz trial did you attend?

A. In numbers, I don't know, but I think I covered probably—I think I covered practically every session. I might have missed a few where we had assistants and substitutes come in, but I covered practically the whole thing.

Q. What would you say with reference to covering the Darcy trial?

A. I think the whole thing I covered.

Q. You covered every session?

A. Uh huh.

Q. Do you remember who the Judge was in the Darcy trial?

A. President Judge Hiram H. Keller.

(201) Q. In that County at that time did your Judges wear robes when they sat on the bench?

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A. I am not quite sure. They changed around that time. I am not quite sure.

Q. Whose room was this, this main courtroom; who occupied that room, which Judge?

A. I don't think there is any designated Judge for any particular courtroom in Bucks County.

Q. And were there cases in the other two courtrooms you spoke of?

A. The other two courtrooms are on the second floor; one in the front of the courthouse and one in the rear.

Q. Now, did you cover the killing of Kelly at Feasterville?

A. No. I did not. That is lying down there.

Q. Yes.

A. No.

Q. Did your paper cover it?

A. Oh, yes.

BY MR. MARGIOTTI: Will the Court bear with us a few minutes?

BY JUDGE MURPHY: While they are waiting, I just want to get an answer to two questions just so I will have my notes on them. Is Mr. Achey, the lawyer who defended Mr. Darcy, still living?

BY THE WITNESS: He is deceased.

BY JUDGE MURPHY: When did he die?

BY THE WITNESS: (202) About a year ago. I am not quite sure.

BY JUDGE MURPHY: You don't know when?

BY THE WITNESS: I don't know the exact date.

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BY JUDGE MURPHY: Is Judge Keller and Judge Boyer still living?

BY THE WITNESS: Judge Boyer is deceased.

BY JUDGE MURPHY: When did he die, if you know?

BY THE WITNESS: I don't know. It is within a couple of years.

BY JUDGE MURPHY: At any rate, Mr. Achey and Judge Boyer are dead?

BY THE WITNESS: They are deceased.

(Photostatic copies of pages of issues of the Doylestown Daily Intelligencer marked "Relator's Exhibits Nos. 12 to 33 inclusive.")

BY MR. MARGIOTTI:

Q: Now, Mr. Butler—or Mr. Thomas, there are other papers published in your County?

A: Yes, there are.

Q: And which paper has the largest circulation?

A: At this time —

Q: At that time.

A: I think the Intelligencer at that time.

Q: Now, have you been subpoenaed to bring with you the copy of (203) the original papers as published and circulated by the Doylestown Daily Intelligencer in Bucks County between December 22, 1947 and January 15—June 15, 1948?

A: Well, I was not, Mr. Margiotti. Mr. Thompson was left last night and the papers are here.

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Q. The papers are here?

A. That is right.

Q. You know that those papers are here?

A. Yes, I do.

Q. I am now going to show you what we have marked temporarily for identification, "Relator's Exhibits Nos. 12 to 33," inclusive, being a photostat of your paper between the dates of December 23, 1947 and February 3, 1948—yes, February 3, 1948. Will you tell me whether or not these are photostats of your originals that are here?

BY MR. MARGIOTTI: Your Honor, we have only selected those papers that have something to do with the case.

BY JUDGE MURPHY: Just so the record will be straight, you said "Relator's Exhibits Nos. 12 to 33" covered from December 22, 1947 to June 15, 1948. We understand that now to be corrected to February 3, 1948.

BY MR. MARGIOTTI: Yes, there are some others there and I wanted to make them other exhibits. That is why I proceeded with what I had originally.

BY JUDGE MURPHY: All right.

(204) BY MR. MARGIOTTI: I am quite certain they are correct photostatic copies.

If the Court please, we have the original papers here and these are the photostats, as the witness has indicated, and we offer the originals and ask leave to substitute photostats.

BY MR. VAN ARTSDALEN: We object to the offer, not as to the authenticity but as to the materiality of the offer, and the relevancy.

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BY JUDGE MURPHY: We are prepared to hear your argument.

BY MR. RYDER: The Respondent's position with relation to this offer is entirely predicated upon the decision of the Circuit Court of Appeals for the Eighth Circuit reported in 300 F. 2d 769.

BY JUDGE MURPHY: You don't mean that —

BY MR. RYDER: 300 Fed. 769; Page 788.

BY JUDGE MURPHY: 300 Fed. 769 at Page 788.

BY MR. RYDER: The decision of the Court involved an application for a motion for a new trial on the ground newspapers published during the course of the trial had been read or could have possibly been read by the jurors, and the Trial Court has refused to consider the affidavits submitted by jurors as well as the newspaper publications.

BY JUDGE MURPHY: (205) What is the name of the case?

BY MR. RYDER: Stewart v. United States.

BY JUDGE MURPHY: There are three Circuit cases on that proposition. They are cited in the Stoehr case, 100 F. Supp. Mr. Margioffi has had the other side of the case.

BY MR. RYDER: I am not familiar with that case. I thought this case was entirely on point.

BY JUDGE MURPHY: You go ahead. We suggest you look at 100 F. Supp.

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BY MR. RYDER: The Court said:

"The affidavit of the publication of the excerpts from the newspapers and the excerpts themselves were immaterial, without evidence other than that of the jurors tending to show that they were read by the jurors, and the receipt of the affidavits of the jurors and of the excerpts from the newspapers in evidence and the grant of a new trial on account of them would have constituted both error of law and an abuse of the discretion of the court . . ."

BY JUDGE MURPHY: Well, notwithstanding what you have read, the situation here is a little different. The question here is that this Court has a Mandate to try to find out if there was such a situation of hysteria and prejudice in Doylestown in Bucks County, Pennsylvania in the week of June 7, 1948 as to prevent (206) this defendant from having a fair and impartial trial. Your objection is overruled. We will take it for whatever light it will give. It is one of the media of communication that might possibly have gotten to the jurors.

BY MR. MARGIOTTI: For the record I may state that these publications cover Tuesday Afternoon, December 23.

BY JUDGE MURPHY: You are not going to read all those the exhibits?

BY MR. MARGIOTTI: No.

BY JUDGE MURPHY: December 22, 1947, "Relator's Exhibits Nos. 12 to 33," inclusive, they cover some time between that period —

BY MR. MARGIOTTI: And February 3, 1948.

BY JUDGE MURPHY: I might say to you if you look at

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the cases, the Stoehr case and Judge McLaughlin's opinion cited in the Stoehr case; you will find the Third Circuit's attitude on the same and you will find Judge Holmes' case that mere possibility of abuse does not mean that there was.

BY MR. MARGIOTTI: While Mr. Butler is marking the other exhibits I would suggest while he is doing that we have a little recess.

BY JUDGE MURPHY: Well instead of taking a ten-minute recess now—Mr. Butler has to have a recess now—has counsel any idea as to what dates they go to?

(207) BY MR. MARGIOTTI: I can state that. These start with Friday, February 6, and they end with Saturday, June 19.

BY JUDGE MURPHY: All right then, there are a batch of papers from February 6 to June 19, 1948 which will be marked "Relator's Exhibits No. 34" to sufficient number to include all of them.

BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: And we suggest that the Clerk write those down now so that counsel can proceed with the examination and have the gentleman on the stand say whether or not they are true copies and after the recess we will have them marked with numbers.

BY MR. MARGIOTTI: There are two or three exhibits which I am going to call attention of the witness to which I would like to have marked.

BY JUDGE MURPHY: I might say we will do that.

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When we take a recess the Reporter is going to get a rest. That one you can single out by the date of the paper. Then we will follow it up by a particular exhibit mark.

BY MR. MARGIOTTI: O.K.

Q. Mr. Thomas, looking at the exhibits that are before you will you select the exhibit that followed the reporting of the verdicts in the Foster and Zietz case or cases?

BY JUDGE MURPHY: Can't that date be ascertained? The notes will show the date of the verdict.

(208) BY MR. MARGIOTTI: Which I understand to be June 4.

BY THE COURT (Addressing the witness): You are about two months off. If you start at the end you will get it quicker. They end at the 19th. Go back to the front.

BY MR. MARGIOTTI:

Q. Now I want you to look at the exhibit which is a photostat of the Doylestown Daily Intelligencer as of Saturday, June 5, 1948, a front page story on the right-hand side headed—I call your particular attention to that particular column which is headed "Judge Boyer Praises Jury For Verdict Condemning 2 Killers To Electric Chair. Do you observe that story?

A. I wrote the story. I didn't write the heading. I wrote the story.

Q. You wrote the story?

A. That is right.

Q. If you will look at that story about the second or third paragraph, you will find that the Judge is quoted.

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A. That is right.

Q. Did you write that?

A. I did.

Q. And where did you get those quotations?

A. They came from the Judge's own lips.

Q. And under what circumstances?

A. So far as—I don't know whether I misquoted him or not. I don't think I did. I don't take shorthand but I took it down as I thought he said it, and the particular time he made the statement it was at the—I think it was right at the completion when the verdict was rendered in the Zietz-Foster trial.

(209) Q. Will you state whether or not the jury was present at the time he made the statement?

A. I don't know, Mr. Margiotti. I don't know whether this story would indicate that or not; whether they had been discharged or were about to be discharged. I don't know, and the story doesn't seem to say—just a second! It has been so long ago I really can't say whether the jury were there or not.

Q. Will you state whether or not the Judge was on the bench when he made the statement?

A. Oh, yes, or I wouldn't have quoted him. I am almost positive of that.

Q. The part that is in quotations, which you say came from the Judge's own lips, is as follows:

"I don't see how you could, under the evidence, have reached any other verdict . . . Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days . . ." —

BY JUDGE MURPHY: Was there a transcript taken in the Court of the Judge's remarks?

I say this with all due respects to the local papers. We have excellent papers. But in last evening's paper this Court is

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quoted saying something yesterday which we did not say. We said just the opposite.

BY MR. MARGIOTTI: Sometimes these things do occur. They happen to me also. But, generally speaking, the papers are correct.

(210) "The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decision," Judge Boyer said."

Those are the quotations that you spoke of —

BY JUDGE MURPHY: We will say to counsel if there is a Court record of what the Court said, instead of this gentleman's interpretation of it, we say it would be most helpful.

BY MR. MARGIOTTI: We agree with you.

BY JUDGE MURPHY: If there isn't, this is the next best evidence and on its own it is a circumstance as to what the public saw. But as to what Judge Boyer actually said, this is this gentleman's interpretation and it may be exactly accurate, I don't know.

BY MR. MARGIOTTI:

Q. May I ask you this question: Did Judge Boyer at any time correct this quotation or call you on the quotation and state that you had misquoted him in a publication that went County-wide?

BY MR. VAN ARTSDALEN: I object.

BY THE WITNESS:

A. No sir.

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BY JUDGE MURPHY: We will take it and we will say we are not going to call the Scranton Times, either.

BY MR. MARGIOTTI: The Scranton Times is not on trial. I don't think (211) you would make a statement of this type if you were trying a case of this type. I am sure you wouldn't.

Q. At least, no one ever corrected it?

A. Not that I know of.

BY JUDGE MURPHY: The Scranton Times story was 99.99% correct. There was one sentence that they quoted the Court as saying which we did not say. By .01% they were wrong.

BY MR. MARGIOTTI:

Q. Will you state now, Mr. Thomas, at the time the Judge uttered these words from his own lips, as you say, whether there were any other persons present in the courtroom?

A. Yes, there were people present in the courtroom.

Q. Who, for instance?

A. I think there were some spectators there; I don't know how many. There were some other newspapermen, there and Court officers.

Q. Do you know whether any other newspapermen picked up the same story and wrote it?

A. I really don't know. I only know that I sent that story out.

Q. Did you send that story to somebody else?

A. Yes, it was sent around.

Q. To whom did you send it?

A. I don't recall exactly. I sent it to the papers that I represented at the time, the Inquirer, the Bulletin, the Daily News

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Q. Philadelphia, and the News Services, the Associated Press, the International News Service and the United Press. I don't know whether they used it or not but it was sent. I remember that distinctly.

Q. Did you send it to any papers in your County?

A. The Bristol Courier.

(212) Q. Is there a connection between the Bristol Courier and your paper?

A. They are owned by the same man.

Q. Is that Mr. Grundy's paper?

A. That is right.

Q. Do you know whether or not the Bristol Courier used the statement?

A. I don't know.

BY JUDGE MURPHY: This paper that has been introduced in evidence was the issue of June 5, and there is some quotation of Judge Boyer, and what I want to know is is this the item which appeared in the Petition for Habeas Corpus that was presented to the District Court as well as the item which appeared in the Petition for Habeas Corpus which was presented to the Supreme Court of Pennsylvania in the paper known as the second Petition for Habeas Corpus?

BY MR. MARGIOTTI: I say yes to that.

BY JUDGE MURPHY: Was it in entirety in the Petition as it is now offered in evidence?

BY MR. MARGIOTTI: It was entirely in the Petition.

BY JUDGE MURPHY: I want to make one observation so that there will be no possible misunderstanding. Mr. Margiotti: We realize that when reporters are in court the Court Reporter

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has nothing to do except take down what happens whereas the reporter has to meet a deadline, they have to get things on the run, and that for that (213) reason there may be discrepancies but they do occur.

BY MR. MARGIOTTI: They even occur with lawyers.

BY JUDGE MURPHY: Well, let's get the Court straight.

BY MR. MARGIOTTI:

Q. I show you now a photostat—an exhibit of Saturday Afternoon, June 12, in which Judge Boyer is quoted concerning "Thieves From Philadelphia."

A. Yes, I see it.

Q. Did you write the story with the exception of the headlines?

A. No, I did not write that story.

Q. Who wrote that story?

A. Probably another man on the staff, but it was a different courtroom entirely from where I was that day.

Q. Who else was on your staff that day—Mr. Trauch?

A. W. Lester Trauch, and duty that day I just don't recall. It would be just a case—we were the two court reporters.

Q. O. K.

BY JUDGE MURPHY: Now for the record the quote which Mr. Margiotti has read from the issue of June 7 appears at Page 414 of 203 F. 2d and it also appears on Page 4 of the Petition for Habeas Corpus.

I am just trying to get them into the record for whoever reads them later on.

There is a footnote on Page 414.

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BY MR. MARGIOTTI:

Q. How about the attendance at the Foster-Zietz trial?

A. What way do you mean, Mr. Margiotti?

(214) Q. First, how about the attendance in the courtroom or outside the courtroom, people trying to get in?

A. It was probably larger than an ordinary assault and battery case. There was more interest in it and naturally there were more people there.

Q. What I want to know is was the courtroom filled?

A. I think at times it was fairly filled. The time the verdict came in I don't remember how many people were there, probably three-quarters filled. There was pretty fair attendance.

Q. During the trial itself —

A. I would say more people than usual were at the trial.

Q. What would you say about its capacity, whether it was filled, three-quarters filled, one-half filled?

A. It varied at times according to the stage of the case.

Q. Were there times people were on the outside trying to get in?

A. I don't think so.

Q. Would your answers apply to the Darcy trial too?

A. Yes, I think it would.

BY MR. MARGIOTTI: That is all for the present.

I would like to release the original files of this witness if there is no objection on the part of the Commonwealth.

BY MR. VAN ARTSDALEN: We haven't objected to the authenticity.

BY JUDGE MURPHY: Do you object to substituting photostats in place of the originals?

BY MR. VAN ARTSDALEN: No, certainly not.

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BY JUDGE MURPHY: (215) They will be received.

Now we will accept the photostats instead of the originals. May we say we hope somewhere along the line it will be developed the jury was kept together and whether or not the jury, which had been selected in the early part of the week of June 7, was permitted to read the Doylestown Daily Intelligencer while they were segregated. First of all, were they segregated? Judge Biggs says there is nothing to show that in his opinion, but certainly everyone in this County would be segregated. Was this one segregated and were they permitted to read the daily papers?

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Thomas, you have stated the circulation was approximately 6,500 at the time of the trial?

A. That may be a little bit high.

Q. None of these papers indicate, the photostats, what the circulation was?

A. Maybe every six months. I don't believe any of those do.

Q. You are not in charge of the circulation in any way so that it is merely an estimate on your part based on what you heard?

A. That is right.

Q. All right. Now then, you stated you were present throughout the Foster-Zietz trial?

A. Most of the time.

Q. Most of the time. Would you say that the courtroom would seat approximately 500 spectators?

A. I think that is about right.

Q. Now then, during the Foster-Zietz trial did you at any time observe any outbursts by any of the spectators?

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A. No, none whatsoever.

(216) Q. Was the courtroom at any time during the Foster-Zietz trial cleared by the Court because of any commotion or disturbance?

A. Not that I recall. I am almost sure it wasn't.

Q. Did you observe any persons making threatening gestures of any sort during the trial of the case, any of the spectators?

A. No.

Q. Was there anything out of the way so far as the behavior of the spectators and attendants at that trial that you observed?

A. Not that I observed.

Q. And I believe you stated at times the courtroom was not filled?

A. That is correct.

Q. Did you observe any crowd, any large crowd, hanging around outside the courtroom at all?

A. There were more people than in the regular criminal case during the noon recess and a lot of newspapermen and photographers and so on around.

Q. Incidentally, were any photographs allowed during the Foster-Zietz trial?

A. We tried it and didn't get away with it.

Q. The Court would not allow it?

A. That is right.

Q. Does that also apply to the Darcy trial?

A. That is right.

Q. Mr. Thomas, you have testified as to the layout of the courtroom and I don't want to labor that, but is it not a fact that the jury in the Foster-Zietz trial and also in the Darcy trial always came in and went out through a side door?

A. You mean the door to the right —

(217) Q. Let me ask you this: The jury box—the jury sits in a row of chairs, is that correct?

A. That is right.

Q. Is there not a door leading to a little corridor under the courthouse approximately ten feet from where the foreman of the jury was?

A. That is right.

Q. It was through that door that the jury was—at all times came in and were brought from the courtroom?

A. Yes. In fact, you didn't ask me—that is the way the jurors came in.

Q. So that the jury at no time was taken down through the main corridor?

A. No sir.

Q. Did they at any time come into contact with the spectators?

A. You mean the jury in the box —

Q. Did they at any time come into contact with the spectators?

A. No, they did not, not that I saw.

Q. How about the prisoners, were they also brought in and taken out through the side door?

A. That is right.

Q. At any time did you see them come through the main courtroom?

A. No.

Q. Do you know whether the jury was taken through the persons outside the courtroom?

A. I don't know.

Q. Did you at any time see the jury on the streets of Doylestown during the trial of either the Darcy or the Foster-Zietz case?

BY MR. MARGIOTTI: We object, not cross-examination.

(218) BY JUDGE MURPHY: We will permit it. I sup-

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pose you mean did he see them seriatim or group, or what do you mean?

BY THE WITNESS: I don't know. I might have seen them going over to the hotel in a group.

BY JUDGE MURPHY: Do you mean he saw them separately or seen the jury as jury?

BY MR. VAN ARTSDALEN: The jury as jury.

BY THE WITNESS: On the streets in Doylestown —

BY MR. VAN ARTSDALEN: Yes.

BY THE WITNESS: Yes, I noticed them going over to the quarters where they slept.

BY MR. VAN ARTSDALEN:

Q. On those occasions were they in charge, or did you see? How many tipstiffs were in charge of that jury?

A. Well, I didn't observe it, but I imagine they would be.

Q. Were they in a group?

A. Yes, they were in a group.

Q. Now, Mr. Thomas, coming down specifically to the Darcy trial were you in attendance throughout the trial of that case?

A. Yes.

Q. Is it not a fact that the number of spectators that attended the sessions of the Darcy trial were far fewer than the number that attended the sessions of the Foster-Zietz trial the week (219) before?

A. I believe you are quite right in that statement.

Q. The evidence that was produced in the Darcy trial was

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to a large extent repetitions of the evidence that was produced in the Foster-Zietz case?

A. Yes sir; so far as I could observe, it was.

Q. Now did you observe any outbursts of any sort or any commotions of any sort during the week of the Darcy trial?

A. I did not, in any of the three trials.

Q. Did you see any of the spectators or witnesses make any gestures of any sort toward the jury or toward the defendant?

A. Nothing I ever saw inside the courtroom, no.

Q. Did you observe anything out of the way—anything out of the ordinary—in the course of that trial?

A. No, not that attracted my attention as a newspaperman.

Q. Have you observed, as a newspaperman, the trial of other criminal cases?

A. I have.

Q. Was there anything in the trial of this case, of the Darcy case, that appeared to you in any way out of the ordinary from the other trials?

BY MR. MARGIOTTI: We object, immaterial.

BY JUDGE MURPHY: You are now in the place where you objected before when the lawyer from Philadelphia was on the stand. You are asking this man to make a comparison. We will permit you to ask the question as to whether or not he saw anything happen at this trial which he had not observed at other trials.

BY MR. MARGIOTTI: (220) We have no objection to that.

BY MR. VAN ARTSDALEN:

Q. Did you observe anything at this trial that you had not observed happen at other trials?

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A. You mean other trials.—

BY JUDGE MURPHY: Other murder trials.

BY MR. VAN ARTSDALEN:

Q. Other murder trials.

A. No; I would say no.

Q. Now, Mr. Thomas, as a newspaper reporter is it not true that you try to write articles that will be of interest to the public?

A. Try to.

Q. And is it not also true that at times you try to enlarge upon the facts to some extent for the purpose of interesting the public?

A. You will have to qualify that. I don't know what you mean by that.

BY JUDGE MURPHY: We will take a ten-minute recess.

(Recess.)

(Photostatic copies of pages of the Doylestown Daily Intelligencer marked "Relator's Exhibits Nos. 34 to 106," inclusive.)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

MR. A. RUSSELL THOMAS, recalled.

CROSS-EXAMINATION (Continued).

BY MR. VAN ARTSDALEN:

Q. Mr. Thomas, during the course of the Darcy trial did you see or observe any mass demonstrations in Doylestown?

A. In the courthouse —

(221) Q. In the courthouse.

A. No, I did not.

Q. Outside the courthouse?

A. No, I did not.

Q. Mr. Thomas, I want to call your attention to "Relator's Exhibit No. 94," being the paper dated Saturday Afternoon, June 12, 1948. There appears an article on the left hand side headed:

"Judge Boyer Warns That Bucks County Is Tired Of Thieves From Phila."

I believe you stated you did not write that article, is that right?

A. No, I did not.

Q. All right, sir. Were you in the main courtroom where the Darcy trial was in progress during the course of that day?

A. I might have been in and out, I can't say, Mr. Van Artsdalen; I can't testify.

Q. Now I call your attention, Mr. Thomas, in this article to a statement reputedly made by Judge Boyer: "Have you heard what's going on down stairs?"

A. I don't know anything at all about that.

Q. All right. You have testified, however, that there are other courtrooms in the Doylestown, Bucks County, Courthouse?

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A. There are two others.

Q. The other two are on the upstairs, is that right?

A. That is right.

Q. Now, were you present when the Foster-Zietz verdict was rendered?

A. When the verdict was rendered I am not certain whether I was at the telephone. I was in the courthouse. I believe I was in the courtroom.

Q. Do you recall whether there was any outburst of any kind at the (222) time that verdict was rendered by the jury?

A. Nothing that was noticeable to me, if I was there. I am not quite sure I was in the side room telephoning. I think I was in the courtroom but I don't recall of any outburst.

Q. Did you hear or observe any applause, any shouting, of any kind?

A. I don't recall any.

Q. Were you in the courtroom when the Darcy verdict was rendered?

A. Yes sir.

Q. That verdict was rendered at 4:30 Friday Afternoon—around 4:30 in the afternoon; is that correct?

A. I think it was late afternoon.

Q. All right, sir. And you say you were present at that time?

A. Yes sir.

Q. Was there any demonstration at the time that that verdict was rendered by any persons in the courtroom?

A. Not that I noticed. I was pretty busy at that time.

Q. Was there any outburst?

A. Not that I noticed.

Q. Was there any applause?

A. Not that I noticed?

Q. Any shouts?

A. Not that I noticed.

Q. Mr. Thomas, have you examined all these exhibits to

Mr. A. Russell Thomas—*Re-direct*

ascertain whether or not they contain all of the articles there were in the *Intelligencer*?

A. No, I haven't looked at them all. I haven't any way of telling that. I looked over those and identified them as copies of the *Intelligencer*.

(223) Q. So that you would not know whether there might have appeared other articles?

A. Yes, I wrote most of those things. I did not write the heads or edit the stories but I wrote the articles.

BY MR. VAN ARTSDALEN: All right, sir, that is all.

Q. Mr. Thomas, I believe that you stated on direct examination that the halls were not filled during the trial of Foster-Zietz?

A. You mean the courtroom —

Q. The halls outside the courtroom.

A. Oh, I have no—I don't remember that. They were filled as they were going into Court I know. I mean when Court convened there were quite a few people but there was no disorder of any kind I saw.

Q. You didn't observe any disorder of any sort in or about the courtroom during either the trial of Zietz-Foster or Darcy?

A. I did not, personally.

BY MR. VAN ARTSDALEN: All right, that is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Thomas, did you observe the number of police officers, either State or local police or other officials, who were there for the purposes of maintaining order?

Mr. A. Russell Thomas—Re-direct

A. Yes, I think they did a pretty good job on that.

Q. How many were there?

A. ~~Oh~~ I don't know, but they had plenty of police there.

They were taking no chances.

Q. They were taking no chances?

A. That is right.

Q. About how many?

(224) A. I don't know. I think there were State Troopers, Deputy Sheriffs, the usual number in a murder case.

Q. How many State Police?

A. I didn't check up on all those people.

Q. Do you remember who had charge?

A. No, I wouldn't know.

Q. Were they in uniform?

A. That I don't recall. I think there were some people in uniform. I don't know whether they were Troopers —

Q. Were the police in Court or outside, or both?

A. I saw both. I saw Troopers sitting in the inside of the courthouse.

Q. Did you see police on the outside?

A. I don't think I did, no. I didn't notice them. I was inside.

Q. They were there to maintain order and they did a pretty good job of maintaining order?

A. They did that.

Q. All right. And that applies to the Darcy trial as well as the other trial?

A. Yes, it does, Mr. Margiotti.

Q. Now you had called to your attention the newspaper of June 12 and I think there was read to you some statement by Judge Boyer, "Have you heard what's going on downstairs?" Do you know whether or not such a statement was made?

A. I don't know.

Q. You know nothing about it?

Mr. A. Russell Thomas—Re-direct

A. I know nothing whatsoever about it.

Q. You didn't write that story?

A. No.

BY MR. MARGIOTTI: (225) We had a witness here on the circulation of this paper and we excused him because we understood this witness would substitute for him, he knew something about the circulation. Now that question is raised and there is a dispute.

BY JUDGE MURPHY: I might just make ~~this~~ observation: Your "Exhibit No. 94" —

BY MR. MARGIOTTI:

Q. Mr. Thomas —

BY JUDGE MURPHY: Just a minute! The Court was in the midst of speaking to counsel. We said that your "Exhibit No. 94," which purports to be the story of Saturday Afternoon, June 12—there are two stories apparently that is directed to the Court's attention, one as to the Darey murder trial and the other Judge Bo, er. I want to say to you that neither story is complete on the exhibit.

BY MR. RYDER: It is on "No. 95."

BY JUDGE MURPHY: All right, that is another number. All right, the stories, for the record, are complete apparently on "Relator's Exhibit No. 95."

BY MR. MARGIOTTI:

Q. During the month of October, 1948—during that entire month did you publish the circulation of your newspaper?

Mr. A. Russell Thomas—Re direct

A. I am in no position to know that. I do know they were usually published the first week in October. I had nothing to do with circulation other than last night Mr. Thompson informed you where to find it in that book and that is what we have done.

(226) BY MR. MARGIOTTI: Your Honor, may I have the witness come down here? Here is a paper of October 6, 1948, the circulation appearing—what is apparently a sworn statement—to be 5,329.

BY THE WITNESS: That would be correct, sir.

BY MR. MARGIOTTI: Is that sufficient, Your Honor, on the question of circulation?

BY JUDGE MURPHY: We don't know; it is your case.

BY MR. MARGIOTTI: I think it takes Mr. Thompson.

BY JUDGE MURPHY: Well, we are here to hear.

BY MR. MARGIOTTI: What is that?

BY JUDGE MURPHY: We are here to hear.

BY MR. MARGIOTTI: I will have to call Mr. Thompson back.

BY THE WITNESS: I might explain that he asked me last night after he had been excused to be sure and not forget the page number of the circulation and I forgot it until I looked it up between and during this recess right now.

BY JUDGE MURPHY: Who was your editor at the time of the Darcy trial?

Mr. A. Russell Thomas—Re-direct

BY THE WITNESS: George Thompson today you mean —

BY JUDGE MURPHY: (227) At the time of the Darcy trial.

BY THE WITNESS: We had a couple of them died.

BY JUDGE MURPHY: What was that?

BY THE WITNESS: I think George S. Hotchkiss.

BY JUDGE MURPHY: Do you remember whether he was editor December 27, 1947?

BY THE WITNESS: Yes he was.

BY JUDGE MURPHY: The day at Feasterville.

BY THE WITNESS: That is right.

BY MR. VAN ARTSDALEN: If it will facilitate the trial we are willing to agree that the circulation as of the date that was stated by Mr. Margiotti was the circulation.

BY JUDGE MURPHY: That certainly helps. That is what we were waiting for. The next order of business.

BY MR. MARGIOTTI:

Q. You have been asked —

If Your Honor please, at this time we wish to introduce "Relator's Exhibits Nos. 34 to 106" so —

BY MR. VAN ARTSDALEN: I object for the reasons stated to "Relator's Exhibits Nos. 12 to 33."

BY JUDGE MURPHY: (228) We will receive the exhibits. We understand there is no objection to them except they are not the originals, is that it? You are not objecting to them because they are not the originals; you are objecting to them as incompetent, irrelevant and immaterial.

BY MR. VAN ARTSDALEN: That is correct.

BY JUDGE MURPHY: We will receive them for whatever they are worth and the photostats in place of the originals.

BY MR. MARGIOTTI:

Q. Now you have testified under cross-examination that the Darcy testimony was about the same?

A. The what?

Q. The Darcy and Zietz-Foster testimony was about the same.

A. To my recollection, I mean —

Q. In general —

A. In general from the notes I followed from the previous trials, details.

Q. Did your paper publish the testimony of the trial of Foster-Zietz?

A. Oh, I am quite sure we did. I wrote it. I don't know whether it was published or not.

Q. Did you write it verbatim question and answer or on a query basis?

A. Certain times of day I did. Certain days we were meeting a deadline we wrote question and answer. We have a paper going to press at noon time. I went back to the office and wrote news at night.

Mr. A. Russell Thomas—Re-direct

Q. You gave impressions of what the testimony was in Court?

A. That is right.

(229) Q. Will you state how many issues you had at that time?

A. One edition.

Q. One edition. What time?

A. About 1:30 in the afternoon.

Q. And you conducted yourself in a manner that you have indicated in reporting the entire Zietz-Foster trial?

A. I think so.

BY MR. MARGIOTTI: Your Honor, I want to know something about the death of Webster Achey.

BY THE WITNESS: As I understand, we were told here his death was January 31, 1953. That is subject to verification.

BY JUDGE MURPHY: January 31, 1953?

BY THE WITNESS: January 31, 1953.

BY JUDGE MURPHY: Is that Judge Boyer or Mr. Achey?

BY THE WITNESS: This is Mr. Achey. That appeared in the newspaper as of that time.

BY MR. MARGIOTTI: May we establish Judge Boyer's death?

Mr. A. Russell Thomas—Re-cross

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Thomas, I show you "Relator's Exhibit No. 2," being a copy of the Bill of Indictment. Now then on the list of witnesses on "Relator's Exhibit No. 2" there appears the name of G. F. (230) Carfagno. Do you know G. F. Carfagno?

A. I do.

Q. Is he a Pennsylvania State Policeman?

A. He was at that time. I think he is now.

Q. There appears the name of K. R. Dane. Do you know K. R. Dane?

A. Yes sir.

Q. Was he a Pennsylvania State Policeman at that time?

A. He was.

Q. There appears the name of William A. Arner. Was he a Pennsylvania State Policeman at that time?

A. He was at that time. I don't know whether he is now.

Q. There appears the name of R. D. Evans. Was he a Pennsylvania State Policeman at that time?

A. He was.

Q. There appears the name of G. M. Sauer. Was he a Pennsylvania State Policeman at that time?

A. He was.

Q. There appears the name of Anthony Russo as Prosecutor. Do you know what his position was?

A. He was County Detective, now deceased; Chief County Detective.

Q. There also appears the name of Lieutenant Jack Hanlon. Do you know whether or not he was a police officer in the City of Philadelphia at that time?

A. That is right; in Philadelphia.

Q. There also appears the name of Sergeant Patrick J. Ken-

Mr. A. Russell Thomas—Re-cross

nely. Do you know whether or not he was a police officer in the City of Philadelphia at that time?

A. That is right.

Q. Do you recall whether all of those persons were called as witnesses at the Darcy trial?

A. I don't remember.

(231) BY JUDGE MURPHY: The transcript is there. There is no doubt about Hanlon being called. There is his testimony. But it is all there.

There appears a statement in the Doylestown Daily Intelligencer, Tuesday, October 7, 1947, as to the statement of the circulation in which the number of circulation is 5,297; is that correct?

BY THE WITNESS: Is that the same one we had over there?

BY JUDGE MURPHY: No; October 6, 1948—October 6, 1947.

BY THE WITNESS: This is correct. They are both different.

BY JUDGE MURPHY: Not much difference in numbers.

BY MR. VAN ARTSDALEN: We will stipulate now we agree to that.

BY JUDGE MURPHY: The circulation apparently increased 32 in a year.

BY MR. VAN ARTSDALEN: That is all.

Mr. A. Russell Thomas—Re-direct

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Do you know whether these officers whose names were called to your attention were also rendering police duty in maintaining order during the trial besides being witnesses?

A. I don't know about that. I don't think they all were.

Q. You don't think they all were. Were some of them?

(232) A. I think a lot of those officers were witnesses, nothing to do with keeping order.

Q. All right. You have mentioned there were a lot of officers that were maintaining order?

A. You misunderstood me. There were some officers there. There weren't a lot of them.

Q. There were some officers there. You said they did a pretty good job?

A. That is the Sheriff and his deputies and Troopers who guarded the prisoner. That is what I meant.

Q. Were there other officers there maintaining order than the ones called to your attention by the District Attorney?

A. I think so. I am quite sure of it but I don't know who they were.

BY MR. MARGIOTTI: I think that is all. Thank you very much.

(Witness excused.)

MR. WILLIAM LESTER TRAUCH, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Trauch, where do you live?

A. Doylestown.

Q. What do you do?

A. I work for the Doylestown Daily Intelligencer.

Q. In what capacity?

A. Reporter.

Q. Did you cover—strike that. I show you "Relator's Exhibit No. (233) 94." I call your particular attention to a story appearing in the left hand column headed: "Judge Boyer Warns That Bucks County Is Tired Of Thieves From Phila."

A. Yes sir.

Q. And I show you a continuation of that story on "Relator's Exhibit No. 95," a continuation of that story.

A. Yes sir.

Q. Will you state whether you wrote that story?

A. Yes sir.

Q. And your Mr. Thomas—will you state whether or not you quoted Judge Boyer in that statement?

A. I tried to, sir.

Q. And did he make the statements that you attribute to him?

A. I tried to—I don't take shorthand like Mr. Thomas. I tried to be as accurate and precise as I could.

Q. In your best judgment, would you say that was accurate?

A. Yes sir.

BY MR. MARGIOTTI: That is all.

BY JUDGE MURPHY: Whether or not the item about which the witness was questioned was contained in the Petition for Habeas Corpus at Pages 6 and 7?

BY MR. MARGIOTTI: Your Honor, it was contained therein and there is a reference to it in Footnote No. 8 at the bottom of Page 10 in the advance opinion of the Circuit Court.

BY JUDGE MURPHY: For the record that would be Page —203 F. 2d at 414, the (234) precise item; the footnote on Page 414.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Now, Mr. Trauch, you remember reporting this particular article, do you not?

A. Yes sir.

Q. Will you tell the Court, please, in what courtroom that hearing took place?

A. That happened in the grand jury room which is on the second floor in the court house and it was during a session of what we call plead-guilty court.

Q. Were any of the members of the Darcy jury present in the room at that time?

A. No sir.

Q. Was the Darcy trial going on at that time downstairs?

A. Yes sir.

Q. And that you know of your own knowledge?

A. Yes sir.

Q. Was Judge Keller in the room when Judge Boyer made these statements?

A. Judge Keller was not there.

Q. Where was he at that time?

A. He was down in Courtroom No. 1.

Q. Was he presiding at that time at the Darcy trial?

A. He was.

Q. Mr. Trauch, just to clear up one point, you have mentioned a grand jury room, that was used, was it not, as one of the courtrooms for trials on occasion?

A. Yes sir.

(235) Q. That is one of the two other courtrooms that you have referred to?

A. Yes sir.

Q. That was held upstairs in an entirely separate room?

A. Yes sir.

Q. Would it be possible for any of the statements Judge Boyer made to be heard downstairs?

A. No sir. There were no spectators in that room.

Q. There were no spectators at that time?

A. No sir.

Q. Were you in and about the courthouse during the Darcy trial?

A. Yes sir.

Q. Did you observe any outbursts of any sort during the trial?

A. Absolutely none.

Q. Did you observe any mass demonstrations or demonstrations of any sort in and about the courthouse during the week of the Darcy trial?

BY MR. MARGIOTTI: We object, not cross-examination.

BY JUDGE MURPHY: The objection is overruled.

Read the question, Mr. Reporter.

William Lester Trauch—Re-direct

(Question read by the Reporter.)

BY THE WITNESS:

A. None at all, sir.

BY MR. VAN ARTSDALEN:

Q. Do you know—or did you observe during the course of the Darcy trial any disturbances in the courtroom?

A. None at all.

Q. Now that was during the period that you were in there?

(236) A. That is right.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Trauch, is your paper sold on the streets of the City of Doylestown?

A. It wasn't at that time, sir. We have had a change in management and things are different now.

Q. Will you state how it was circulated in Doylestown?

A. At that time we had a news agency and papers were taken down to the news agency and people went either to the news agency or to the office of the newspaper. We have no news place.

Q. And at that time how many news agencies had your paper for distribution?

A. You mean in Doylestown —

Q. In Doylestown.

A. One.

Q. Where was that located?

A. Do you know where the Doylestown Inn is?

Q. I know Doylestown very well.

A. Across from the Doylestown Inn, Kenny's News Agency.

Q. Do you know where the jury stayed during the Darcy trial?

A. It might have been the Doylestown Inn.

BY JUDGE MURPHY: Do you know?

BY THE WITNESS: I am sorry, sir, I don't.

BY MR. MARGIOTTI:

Q. The news agency is a public place where anybody can go in and (237) buy papers?

A. A regular newsstand, sir.

BY MR. MARGIOTTI: That is all.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Just to clear up a possible misunderstanding, Doylestown is a borough and not a city?

A. Yes sir.

BY JUDGE MURPHY: The Court will take judicial notice of the census figures of Doylestown. The Court has passed through there 1,000 times.

BY MR. VAN ARTSDALEN: That is all.

A. Russell Thomas—*Re-direct*

BY MR. MARGIOTTI: That is all.

(Witnessed excused.)



MR. A. RUSSELL THOMAS, recalled.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Thomas, are you acquainted with the method pursued by the newspaper in distribution of your paper in Doylestown, particularly in Doylestown, during the Darcy trial?

A. Well, as Mr. Trauch said, if you wanted to buy an Intelligencer you would buy it at the newsstand or come to the office, or if you subscribed for it it was delivered to your home.

BY MR. MARGIOTTI:

Q. All right ———

A. Not by the Intelligencer but by the news agency.

(238) BY MR. MARGIOTTI: That is all.

BY JUDGE MURPHY: It is now 4:13. We will ———

BY MR. LAWLEY: For the record, "Relator's Exhibits Nos. 94 and 95," only part of the article is contained in the Petition for Writ of Habeas Corpus, not the entire article.

BY JUDGE MURPHY: Is that true as to both references, those two articles?

BY MR. LAWLEY: I am referring to Judge Boyer's article.

BY JUDGE MURPHY: There is reference to two of Judge Boyer's. Which one?

Judge Boyer sentenced the boy from Philadelphia where he gave four to twelve months, according to the record. Then there is Judge Boyer taking the verdict in the Foster-Zietz case and making a statement. Which do you mean?

BY MR. LAWLEY: Sentence of the boy for robbery.

BY JUDGE MURPHY: Only part of that is in the Petition?

BY MR. LAWLEY: Yes sir.

BY JUDGE MURPHY: And only part of it is in 203 F. 2d?

BY MR. MARGIOTTI: I think that is correct.

BY JUDGE MURPHY: But as much as is in the Petition is in 203 F. 2d?

BY MR. MARGIOTTI: (239) Yes sir.

BY JUDGE MURPHY: The Court now adjourns until 10:00 o'clock tomorrow morning unless by accommodating counsel we can get one more witness.

BY MR. MARGIOTTI: I would like to call a doctor.

BY JUDGE MURPHY: The doctor has gone, hasn't he?

BY MR. MARGIOTTI: He had to fill some teeth.

Dr. Carl J. Hoffman—Direct

BY JUDGE MURPHY: How long will it take?

BY MR. MARGIOTTI: Not long.

BY JUDGE MURPHY: All right, we will accommodate him.

We understand that three lawyers have been accommodated and a doctor and one newspaperman, and there is some gentleman there from the television station who has three youngsters. I hope we can get to him sometime or other.

DOCTOR CARL J. HOFFMAN, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Where do you reside?

A. At the present time in Philadelphia, Bristleton, 9500 Hillspeck Street.

Q. What is your profession?

(240) A. I am a physician.

Q. And where did you graduate?

A. Medical school—

Q. Yes.

A. George Washington, Washington, D. C.

Q. Will you state, Doctor, whether you are practicing your profession at this time?

A. Yes sir.

Q. Are you acquainted in Bucks County?

Dr. Carl J. Hoffman--Direct

A. I was raised in Bucks County.

Q. Where?

A. Richburg.

Q. How far is that from Doylestown?

A. Seven to twelve miles. I can't say which way.

Q. Southeast--northeast?

A. More or less northwest. I am guessing at that.

Q. Do you recall of the killing at the Feasterville Inn?

A. Very well.

Q. And subsequent to that killing and prior to the trial of Foster-Zietz and Darcy, prior to those trials, were you in Bucks County?

A. Yes sir.

Q. What section of Bucks County did you visit?

A. Feasterville, Richboro, Newtown, Doylestown, spots in between.

Q. What took you into the County?

A. My family lives there. My wife's family lives there and many of my friends are in the Bucks County area and some of my patients were there.

Q. Will you state whether or not you had occasion to engage in conversations with persons in that County?

(241) BY JUDGE MURPHY: Do we have any assurance this is not going on for another hour? Are you waiving cross-examination?

BY MR. VAN ARTSDALEN: No sir.

BY MR. MARGIOTTI: I have no assurance.

BY JUDGE MURPHY: We are not going to have the clock get around to that situation. We will meet at 10:00 o'clock tomorrow morning. We understand the Doctor will be a com-

Dr. Carl J. Hoffman—Direct

plete and thorough witness. We expect him to be and he should be treated accordingly. We thought it was just a matter of five or ten minutes, but it isn't. So until 10:00 o'clock tomorrow morning.

(Court adjourns for the day.)

(Court resumes on Saturday, March 13, 1954 at 10:07 A. M. with all parties, including the Relator, David Darcy, present in Court.)

DOCTOR CARL J. HOFFMAN, recalled.

DIRECT EXAMINATION (Continued).

BY MR. MARGIOTTI:

Q. Doctor, between the time of the killing in this case, which was December 22, 1947, and the date of the trial of the Darcy case, which I understand began on the 7th day of June, 1948, I want you to state whether you were in Bucks County.

A. Yes, quite a bit.

Q. Were you in there during the entire period or during part of that period?

A. Part of that period.

Q. Which part?

A. I can't recall the exact dates but I can put it this way: I was (242) stationed at Fort Hancock with the United States Disciplinary Barracks so that I would get into Bucks County still even at that time two or three times a week from the time of the killing up until April 3rd at which time I was discharged

from the Army and then I spent a good half of my time in Bucks County.

Q. Did you have a commission in the Army?

A. Yes, I did.

Q. What commission did you have in the Army?

A. I was a Captain in the Medical Corps.

Q. Were you honorably discharged?

A. Yes sir.

Q. Now then, I understand that from April 3rd on how much of your time did you say you spent in Bucks County?

A. A good half of my time was spent in Bucks County.

Q. During that period did you engage in conversations with citizens of that County and habitants of that County?

A. Yes.

Q. Did you engage in conversations concerning the Feaster-ville killing and Mr. Darcy?

A. Yes sir.

Q. With whom did you engage in these conversations?

A. People I knew in Bucks County, also the people I came in contact with; for example, we would go out for dinner either to Newtown or out up to Doylestown. I may pass around and shop in Newtown—in fact I still bank in Newtown. I would go in the department store in Newtown or the bank and just casually talk to people, some of whom I didn't know by name, but in Bucks County when you are around you recognize faces and you talk or converse:

Q. From these conversations did you gain an impression concerning the sentiment existing in that County?

A. Yes.

Q. About the defendant?

(243) A. Yes.

Q. What was the sentiment as you found it?

BY MR. VAN ARTSDALEN: I object.

Dr. Carl J. Hoffman—Direct

BY JUDGE MURPHY: The objection is sustained.

BY MR. MARGIOTTI:

Q. Will you tell the Court just what experiences you had in meeting members of the public and tell what was said and the circumstances by which it occurred, so that the Court can determine what the sentiment was?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it subject to the objection.

BY MR. MARGIOTTI:

Q. Go ahead.

A. For example, if I went into a garage and asked for gas and had my car serviced the topic of conversation would come up as to the killing in Feasterville at least for a few minutes. Someone —

Q. What was said?

A. Someone would say "They ought to be hanged" or "get the chair," or "Why bother with them?" They were the things that I recall most vividly in my mind. Now that would be apt to occur in any spot that we visited. It was the highlight of conversation in my travels through Bucks County, at least that part.

Q. And will you state whether or not that was the feeling generally found by you at some specific spot, some specific location in the County?

A. That was the feeling I found no matter where I was —

(244) BY MR. VAN ARTSDALEN: I object and move that it be stricken.

BY JUDGE MURPHY: The objection is sustained; it will be stricken.

BY MR. MARGIOTTI:

Q. Did you find those expressions in more than one place?

A. I didn't get that question.

Q. Did you hear those expressions that you have enumerated in more than one location?

A. Yes.

Q. How many locations?

A. At least three.

Q. And where were these locations?

A. Richboro, Newtown, Feasterville.

Q. Did you get into Doylestown?

A. Yes.

Q. What about Doylestown?

A. I can't be as specific about Doylestown because our travels in Doylestown were limited to window shopping with the family.

Q. Will you state whether or not you heard any expressions relative to the city from which the defendants came from?

A. Yes.

Q. What were those expressions?

A. The idea of boys in Philadelphia coming into Bucks County. There appeared to be—we talked about the idea of them coming in.

Q. Well, can you tell me specifically what was said, rather than talking about the idea?

A. I can't recall the exact conversations, Mr. Margiotti.

Q. In substance.

A. Substance, yes. They considered them as gangsters and undesirable elements —

Dr. Carl J. Hoffman—Direct

(245) BY MR. VAN ARTSDALEN: I object and move that it be stricken.

BY JUDGE MURPHY: The objection is sustained. Tell what occurred.

BY MR. MARGIOTTI:

Q. Not what they considered them. What did they say? Don't give a conclusion but give what was said, the substance of what was said.

A. In using that word before, that word "gangsters" was mentioned.

Q. That word "gangsters" was mentioned?

A. Yes, it was.

Q. All right, tell us what was said about the "gangsters," the substance of the conversations. Don't give your own conclusions. That is what the objection is about.

A. All right, I see. "The boys were the gangsters . . ."—whatever terms was used, ". . . coming into Bucks County doing these crimes in Bucks County and they should have stayed in Philadelphia." That is as close as I can recall the substance.

Q. And was there anything else said in connection therewith?

A. I am not quite sure I understand your question.

Q. Was there any feeling expressed in connection therewith?

A. Yes.

Q. What was the feeling expressed in connection with the statement? What was the expression?

BY MR. VAN ARTSDALEN: I object.

BY THE COURT: We will take the question as amended.

BY THE WITNESS:

A. That is as to the expressions of the people —

(246) BY MR. MARGIOTTI:

Q. Yes.

A. That—besides that the expression was that "There should be no mercy," and "We should throw them out."

Q. Should what?

A. "Throw them out."

Q. "Throw them out" of where?

A. That I can't say, I don't know. It was a term that was used.

Q. Will you state whether or not you were in Doylestown at any time during the week of the Foster-Zietz trial?

A. I don't recall because we went to so many spots. It is like trying to recall four or five weeks ago at a particular time. We would just as apt to be there as we would have to go into Newtown.

Q. Were you in Doylestown at any time of the week of the Darcy trial?

A. No.

Q. These sentiments, these expressions of sentiments, which you testified to, will you tell when they occurred with reference to the Darcy trial?

A. There were two main times; one was shortly after the incident in Feasterville, it was the height of talk at that time. Then again when on getting out of the Army in April there was occasionally—that would be the topic of conversation. But towards the end of May, the early part of June, that again was the highlight of conversation.

Q. Do you know what was going on towards the end of May or early part of June?

Dr. Carl J. Hoffman—Cross

A. Yes. The trials began, I believe, in the last week in May and the Darcy trial was the one that followed.

BY MR. MARGIOTTI: (247) That is all.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Doctor, where is Fort Hancock?

A. Fort Hancock is located in New Jersey.

Q. Now, what part?

A. The northern part. It is a tiny tip —

BY MR. MARGIOTTI: May I be excused for a minute?

BY THE WITNESS: It is a tiny tip of land sticking out into the part of New York, the harbor area.

BY JUDGE MURPHY: Mr. Margiotti, who is of counsel for the defendant, has asked the Court if he may be excused for a few minutes. Judge Pannell and another gentleman—there is another lawyer; his name was in the paper. Where is he? Isn't there another lawyer connected with the defense? The paper says there is. The paper says there is another lawyer connected with the defense. I want to show the defendant is adequately represented, and the defendant is here and at least we have Judge Pannell. According to the paper, there is another lawyer representing the defendant. There is another lawyer represent the defendant.

Are you a lawyer?

BY MR. LORENZO: No sir.

BY JUDGE MURPHY: Is there another lawyer connected with the defense?

BY MR. LORENZO: No.

BY JUDGE MURPHY: (248) They described you as a lawyer inadvertently.

At any rate, Judge Pannell is here to represent the defendant.

BY MR. MARGIOTTI: He is a lawyer in one county.

BY JUDGE MURPHY: If it is a question of personal inconvenience with Mr. Margiotti, we will await until he comes back. If he wants to transact business —

BY MR. PANNELL: I know it isn't business.

BY JUDGE MURPHY: You mean he needs a personal recess?

BY MR. PANNELL: Yes.

BY JUDGE MURPHY: We will not wait for other reasons. We will take a five-minute recess.

(Recess)

(Court resumes after the recess with all parties, including the Relator, David Darcy, present in Court.)

(Sidebar)

BY JUDGE MURPHY: Judge Watson was afraid you were ill and I didn't want to go ahead.

Dr. Carl J. Hoffman—Cross

BY MR. MARGIOTTI: I was and I went to the toilet.

BY JUDGE MURPHY: It is O.K.

(End of Sidebar).

(249) DOCTOR CARL J. HOFFMAN, recalled.

CROSS-EXAMINATION (Continued).

BY MR. VAN ARTSDALEN:

Q. Now, Doctor, where is Fort Hancock in relation to Philadelphia?

A. It is north of Philadelphia. It is approximately fifty or sixty miles from Philadelphia.

Q. How far is it from Doylestown, Pennsylvania?

A. Approximately sixty miles.

Q. And you were on active duty until April, is that correct?

A. That is right.

Q. And how many occasions did you come into Bucks County between December 22 and April when you were discharged from the Army?

A. At least twice a week besides weekends.

Q. At least twice a week besides weekends. What was your reason for coming into Bucks County on those occasions?

A. To see my family who I have spent very little time with up until that time for approximately four years.

Q. Where did your family live?

A. Most of the time with my in-laws in Churchville.

Q. Where was your family living between December 22 and April when you were discharged from the Army?

Dr. Carl J. Hoffman—Cross

A. Both places. My mother-in-law was quite ill for a number of years so that my wife divided her time between her mother's home in Churchville and the home we were trying to put together in Philadelphia.

Q. How far is Churchville from Doylestown?

A. Actually in miles I am not certain. We have driven it often. I can make it in twenty-twenty-five minutes.

Q. Can you give us any estimate of the distance, sir?

A. I would say about fifteen miles, approximately that.

(250) Q. Do you have—did you know any of these defendants prior to the incident?

A. I did not.

Q. Did you know any of the family of these defendants prior to the incident?

A. I did not.

Q. Do you have any professional interest in this case?

A. No—now before I leave that answer set I want to be certain in what way. At one time I was asked to examine this boy to give an opinion but that was after a good many months after the case had been heard in Doylestown.

Q. When was that?

A. I don't recall the date. It was quite a while ago. It is in the records somewhere.

Q. You examined who—the defendant, David Darcy?

A. I examined the defendant, David Darcy, through a screen in the Doylestown prison with the permission of Warden Handy.

Q. Are you a psychiatrist?

A. I practice psychiatry and neurology.

Q. So that at that time you conferred with David Darcy in your professional capacity, is that correct?

A. That is right.

Q. Now, Doctor, you have brought to the Court's attention certain generalizations about conversations you heard. Can you be specific as to any particular conversation?

Dr. Carl J. Hoffman—Cross

A. You mean like giving names of people —

Q. Yes.

A. No, I can not.

Q. Can you be specific as to any particular time, any particular day or place?

A. Place, yes; date, no.

(251) Q. All right, the place. What place?

A. Richboro garage, Richboro general store, First National Bank and Trust Company, Newtown, Savage Bros. —

Q. You mentioned various places. Can you recall any precise conversation that took place at any of those places?

• BY MR. MARGIOTTI: I request the witness be permitted to finish his first answer.

BY THE COURT: Read the question and answer, Mr. Reporter.

(Question and answer read by the Reporter)

BY THE WITNESS: —the garage, there is a gas station in Feasterville. They are specific spots that I know. Then there could have been any of the little stores, little antique shops.

BY MR. VAN ARTSDALEN:

Q. Could have been. I am asking you about precise places.

A. As specifically as I can recall, those are the places.

BY JUDGE MURPHY: Read the question, Mr. Reporter.

(Question read by the Reporter)

BY THE WITNESS:

A. There are several others come to my mind. Give me time and I will give you many more.

BY JUDGE MURPHY: Answer this one now. We have gone back there. Answer the question.

BY THE WITNESS: All I can recall is this: You go into the store, pick up your mail if it is there, you buy something at the counter, you talk to people you know and generally get into conversation (252) with many of them. It was a general conversation.

BY MR. VAN ARTSDALEN:

Q. I am asking you about precise conversations.

BY JUDGE MURPHY: Do you understand that question, as a psychiatrist and neurologist?

BY THE WITNESS: He means names—

BY JUDGE MURPHY: He means do you remember any one conversation you had about this case or these cases?

BY THE WITNESS: Yes.

BY JUDGE MURPHY: The answer is yes.

BY MR. VAN ARTSDALEN:

Q. Will you tell us where a precise conversation that you recall took place?

Dr. Carl J. Hoffman—Cross

A. One in the garage in Richboro.

Q. Can you give us the date or approximate date?

A. No, I can not.

Q. No approximate date at all?

A. Approximate date, yes; in the latter part of May.

Q. And do you know with whom you spoke?

A. That I don't.

Q. What was said?

A. He said that "It was a shame . . ."—something to this effect, "It was a shame we had this happen and they should be hung."

Q. Now, were you having a conversation with just one person at that time?

(253) A. No.

Q. How many people were there?

A. Three or four. There were always three or four around. It kept shifting.

Q. Were they persons that you knew?

A. Could have been.

Q. Who precipitated the conversation?

A. That I don't know.

Q. You say they could have been. In other words, you do not know whether they were people that you had known or not?

A. Not at this time I don't recall, no.

Q. And all that you can recall was "It was a shame we had this happen and they should be hung?"

A. Yes.

Q. And do you know to whom they were referring when they said that?

A. To the boys involved in the Feasterville killing.

Q. What brought on that conversation?

A. This: "What have you heard about the case?"

Q. Who said that?

A. I would say it many times.

Q. You would say it many times. In other words, you precipitated the conversation, is that correct?

A. Many times.

Q. Why did you precipitate these conversations?

A. Because if I didn't, someone else would.

Q. You were interested in the case, were you not?

A. I wasn't—I am sorry, I was interested in the case, yes.

Q. Of course, you were; and it was your interest in this case that brought about a great many of these conversations, was it not?

(254) A. That I don't know.

Q. You are still interested in the case, are you not, Doctor?

A. Yes.

Q. Now, Doctor, you testified, I believe, that you are not sure whether you were in Doylestown during the Zietz-Foster trial, is that correct, but you may have been?

A. That is right.

Q. You mean that it didn't—if you were in Doylestown it didn't make any impression upon you?

A. No, it isn't that, but in coming home—in coming home and traveling around Doylestown I don't recall the exact dates. It just as easily could have been there at that time. The interest was the same.

Q. At any rate, if you were in Doylestown during the Zietz-Foster case you observed nothing that particularly attracted your attention toward this case, did you?

A. What do you mean?

• BY JUDGE MURPHY: The question is, Doctor, you a trained psychiatrist and neurologist, can you tell of one incident that you can recall in connection with any of these cases in Doylestown about the time of the trial? Do you understand the question?

Dr. Carl J. Hoffman—Cross

BY THE WITNESS: I understand the question. I am trying to find out if he means a demonstration.

BY JUDGE MURPHY: Any incident that you can call to memory right now?

BY THE WITNESS: No.

BY MR. VAN ARTSDALEN:

(255) Q. You testified, I believe, you were not in Doylestown during any of the Darcy trial, is that correct?

A. Yes.

Q. Now then, Doctor, you wrote a letter at one time to the Board of Pardons, did you not?

A. Yes.

BY JUDGE MURPHY: I just want to say this to the Commonwealth: Of course, you can go far afield, if you desire, in cross-examination. The Mandate has come down restricting this Court to a narrow issue. We are not going to follow the usual rule. You can open the door and get us in right field where we don't belong. We belong on the diamond in a ball game—on the diamond in whatever it is. It is apparent at this minute that this matter appeared in the proceedings in the Petition. You are trying to get over to the Board of Pardons. In your opinion, he already has an interest. I want to say to you we have an issue of prejudice and hysteria at Doylestown at or about this time. The fact he appeared before the Board of Pardons would tend to show, so far as you view it, perhaps he is an interested witness. But we are not going to get into this psychiatric-neurologic phase which last stopped in Philadelphia.

You go ahead.

Dr. Carl J. Hoffman—Cross

BY MR. VAN ARTSDALEN: I will be very brief.

BY JUDGE MURPHY: I don't mean for you to be brief.

BY MR. VAN ARTSDALEN:

Q. Now, Doctor, I show you part of the original record of the Petition filed in this case for a Writ of Habeas Corpus and show you in that Petition—in that original Petition filed in this (256) Court a photostatic copy of a letter which you wrote. Is that correct?

BY MR. MARGIOTTI: In order that we may have the record clear on this subject, may we ascertain the purpose of the cross-examination?

BY JUDGE MURPHY: No, we have made our observation and your request for the moment at least is denied. Go ahead. Read the question, Mr. Reporter.

(Question read by the Reporter)

BY THE WITNESS:

A. Yes.

BY MR. VAN ARTSDALEN:

Q. And you did write that letter, sir?

A. Yes.

Q. Now in this letter —

BY JUDGE MURPHY: Just a minute, please!

BY MR. VAN ARTSDALEN: Excuse me!

Dr. Carl J. Hoffman—Re-direct

BY JUDGE MURPHY: All right, we ask you to state for the record what your legal purpose is in pursuing this line of inquiry.

BY MR. VAN ARTSDALEN: To attack the credibility of this witness, to show in that letter he made no reference to these alleged conversations he testified to.

BY JUDGE MURPHY: The letter speaks for itself and it is already before (257) the Court and the Court can read it and interpret it.

BY MR. MARGIOTTI: That wasn't the purpose —

BY JUDGE MURPHY: We are not going to get on a side issue. We will be here on this long enough.

BY MR. VAN ARTSDALEN: That is all.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. You said you made a psychiatric examination of the defendant Darcy?

A. Yes sir.

Q. Now, may I ask when that occurred?

A. I don't recall the date.

Q. Would you look at that letter which the District Attorney has shown you to refresh your memory?

A. Not as to the date of the examination because I see many. I also see a great many people, and I had been seeing them for the City of Philadelphia, House of Correction, Holmesburg Prison.

Dr. Carl J. Hoffman—Re-direct

Q. Would you look at the letter to see if there is anything in that letter that refreshes your memory as to the date of the examination?

A. No.

Q. Do you know if it was before or after the conviction?

A. It was after the conviction.

Q. Approximately how long after? Do the best you can.

A. Approximately two years.

BY MR. MARGIOTTI: That is all.

(258) BY MR. MARGIOTTI:

Q. I understood you to say in answer to a question framed by the District Attorney that you had an interest in the case?

A. Yes.

Q. What interest is that?

A. At the present time —

Q. Yes.

A. My interest now is to try to correct what I think was a wrong.

Q. Is that interest other than the interest of a citizen, or do you have a personal interest?

A. As a citizen, a former resident of Bucks County.

Q. No personal interest?

A. Not at the present time no personal interest. I am not here for a personal interest.

Q. You were subpoenaed to come here?

A. Yes.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

BY MR. MARGIOTTI: Last evening we excused the news

Dr. Carl J. Hoffman—Re-direct

writer by agreement. I don't want to say anything for the record without Mr. Ryder being here.

(Exhibits marked "Relator's Exhibits Nos. 107 to 111," inclusive)

BY MR. MARGIOTTI: If the Court, please, by agreement of the parties, subject to the approval of the Court, we offer in evidence "Relator's Exhibits Nos. 107 to 111," inclusive, and these are photostats of the Newtown Enterprise, which I understand is published at Newtown, Bucks County, Pennsylvania, the dates appearing thereon (259) beginning January 1, 1948 and ending June 10, 1948; and it is admitted that this is a weekly newspaper with a circulation of 1,972 all within a radius of five miles of Newtown, and that the 1,972 is the average circulation for twelve months preceding October 7, 1948.

BY MR. RYDER: The Respondent agrees —

BY JUDGE MURPHY: What day of the week does the paper come out?

BY MR. MARGIOTTI: Thursday. They are all marked "Thursday."

BY MR. RYDER: The Respondent agrees to the authenticity of these exhibits "Nos. 107 to 111," inclusive. I believe it is; but we object to the introduction of them into evidence on the grounds they are incompetent, irrelevant and immaterial for the reasons stated with respect to the other exhibits yesterday of the same nature.

Now then, the Respondent agrees that the average weekly circulation for the twelve-month period prior to October 7, 1948 was 1,972; and that all of those were distributed within a five-mile radius of Newtown, Bucks County, Pennsylvania.

BY JUDGE MURPHY: The objection is overruled. We have here, gentlemen, the issue of Thursday, January 4, 1948. Is there something here about the case?

BY MR. MARGIOTTI: Page 1, Column 7, Your Honor.

BY JUDGE MURPHY: Yes; all right. "Easy Amas Money..."

(260) BY MR. MARGIOTTI: That is right.

BY JUDGE MURPHY: Go ahead.

BY MR. MARGIOTTI: We have a synopsis of the articles that appear in all these newspapers and where they are found, and for the convenience of the Court I would like to hand it up.

BY JUDGE MURPHY: It may help burning eyes out later on.

Have you a copy for the other side?

BY MR. MARGIOTTI: I think they are right in asking for one. We don't have one now.

BY JUDGE MURPHY: Suppose you take it in the meantime and check it.

BY MR. RYDER: We don't need it.

BY JUDGE MURPHY: Suppose you take it and check and save our eyes.

BY MR. RYDER: All right.

John J. Kerrigan - Direct

MR. JOHN J. KERRIGAN, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Kerrigan, where do you reside?

A. Newtown, Pennsylvania.

Q. Where do you work?

A. Bristol, Pennsylvania.

(261) Q. By the way, how far is Newtown from Bristol?

A. I believe about fourteen or fifteen miles.

Q. I see. And in December 1947 and during the trial of Foster, Zietz and Darcy what were you doing?

A. Well, I at that time was in Wilmington, Delaware, employed as a reporter for The Journal every evening in that city.

Q. And did you ever come to Bristol in connection with some paper?

A. Yes, I did.

Q. When did you come to Bristol?

A. On September 1st of last year.

Q. Of this last year?

A. 1953.

Q. And what paper did you go with?

A. The Bristol Daily Courier.

Q. And in what capacity?

A. I am Managing Editor.

Q. And as Managing Editor do you have control of what is known as a morgue of the newspapers?

A. In a rather loose and general way, yes.

Q. You were asked to bring here the newspaper's files of the

Bristol Daily Courier's continuing issues thereof for and during the period beginning December 1, 1947?

A. I was asked to bring those, yes.

Q. That was by subpoena?

A. Yes.

Q. Have you brought them?

A. Those filed copies, those issues, and other filed copy issues of the Bristol Daily Courier were sent last summer, I understand, to a firm in Cleveland, Ohio, to be microfilmed and the microfilm is to be returned to the Courier and the filed copies are (262) to be destroyed, and that is being done very gradually. We do not have now the filed copies you are interested in.

Q. Do you have any microfilm at all?

A. We have some of the years 1910 or 1911, something of that sort.

Q. Nothing down there in your file?

A. Nothing.

Q. The reason —

BY JUDGE MURPHY: What date did you ask the gentleman for—the day of the killing until the end of the trial?

BY MR. MARGIOTTI: December 21 —

BY JUDGE MURPHY: Did you ask him to bring papers from December 21 until when?

BY MR. MARGIOTTI: For and during the period beginning December 1, 1947 and ending June 30, 1948.

BY JUDGE MURPHY: As I understand it, you do not have the original papers themselves?

BY THE WITNESS: No.

John J. Kerrigan—Direct

BY JUDGE MURPHY: Does the Bristol paper have a morgue?

BY THE WITNESS: In what sense?

BY JUDGE MURPHY: In the sense you cut out the news items and put them in (263) an envelope and put them away for future reference. Whenever you want to cover a future story you go to that morgue and you have background.

BY THE WITNESS: We have some parts of a morgue. We do not have a complete morgue.

BY JUDGE MURPHY: Did you have one on this case?

BY THE WITNESS: No sir, not that I know of.

BY MR. MARGIOTTI:

Q. Have you ever searched your files for the purpose of ascertaining whether you have the kind of record the Court indicated in its questions?

A. I have looked into that and learned generally that we do not have such a morgue record.

Q. Do you make it a practice to keep your morgue in the manner suggested by the Court, have an envelope for each story or each individual in your community and so on?

A. Going back for a period of two months, we do.

Q. Before that?

A. Before that there were some files kept, some records kept, but not on an envelope basis and not on the comprehensive basis that a real morgue calls for, in my opinion.

BY JUDGE MURPHY: Are you going to attempt to try to get the contents of the Bristol paper in, secondary evidence?

John J. Kerrigan—Direct

BY MR. MARGIOTTI: I don't think so. What I am trying to do—I understood (264) this situation—is to lay the evidence before the Court and then in some manner in support since it will be some time, I assume, before the Court rules on the matter —

BY JUDGE MURPHY: I don't know. Don't make any suppositions.

BY MR. MARGIOTTI: I gathered that from the view to withhold your decision the other day on the other proposition —

BY JUDGE MURPHY: Don't make any suppositions. Don't speculate.

BY MR. MARGIOTTI: If it is convenient when they get their microfilm back to introduce —

BY JUDGE MURPHY: What you want us to do is wait until some firm in Cleveland is finished with the microfilm and then you have produced for you the papers from December 1, 1947 to June 30, 1948, and then apparently without any examination of the papers to wait until there is an examination made and then if there is anything pertinent, for us to receive them.

BY MR. MARGIOTTI: I don't mean it that way. It is going to the extreme. I mean if it is convenient if the Court has not disposed —

BY JUDGE WATSON: Couldn't we go on with evidence, some relevant testimony, in this case that is going to help the Court? This doesn't help us at all.

John J. Kerrigan—Direct

BY MR. MARGIOTTI: I disagree with you.

BY JUDGE MURPHY: (265) We understand if and as and when there is something in the Bristol paper that interests the Court, will we hold it open?

BY MR. MARGIOTTI: I wouldn't want you to hold it open for that purpose. "If it is open, naturally then we will come in."

BY JUDGE MURPHY: If it is open and there is light, we always like to get light.

BY MR. MARGIOTTI: Yes.

Q. Mr. Kerrigan, will you state whether or not there is anybody in your firm that knows whether or not your paper carried the news of the Feasterville killing as well as the trial?

A. I believe there is a person who knows the answer to that question.

Q. Well, who would know that?

A. Well, I could think of several people.

Q. The most important person.

A. Mr. J. Paul Pettigoe, possibly.

Q. Now you were asked to bring records showing the records of circulation of the Bristol Daily Courier during the period that I have mentioned; you have that?

A. I have a printed copy of the sworn circulation statement for the twelve month period ending September 30, 1948, and that shows the circulation, the average circulation, for that period at 5,397.

Q. Is your paper a daily paper?

A. Yes.

Q. And do you know what time your paper went out on the stands or went out to subscribers?

John J. Kerrigan—Direct

A. I don't know precisely. I wasn't there. I could tell you (266) what I heard or what I believe to be the situation. That is about all.

Q. In general, how soon after your paper has been published?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained to that line of examination. The gentleman was in Wilmington, Delaware, and no way connected with the paper, good, bad or indifferent, at the time.

BY MR. MARGIOTTI:

Q. Who would know in your organization how soon after a paper is out and published and off the press it gets into the hands of the public?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We think this line of inquiry ought to be pursued outside of this courtroom. You want to know what witness you ought to subpoena. This is a matter for your investigator.

BY MR. MARGIOTTI: This witness has come here pursuant to a subpoena and we asked him when he was here and he didn't get it.

BY JUDGE MURPHY: We think this is an investigator's matter. This witness was down in Wilmington, Delaware.

BY MR. MARGIOTTI: That is all.

George A. Koehler—Direct

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN: No questions.
(267) We move to strike out his entire testimony.

BY JUDGE MURPHY: Oh, let it there. More strokes for the Reporter to strike it out.

BY MR. VAN ARTSDALEN: That is all.

(Witness excused.)

MR. GEORGE A. KOEHLER, called and sworn on behalf of the Relator, on direct- and cross-examination testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Koehler, where do you reside?

A. Collingswood, New Jersey.

Q. From December 22, 1947, to, say June 15 or June 20, let's say, 1948, where did you live?

A. Camden, New Jersey.

Q. What did you do during that last period?

A. I worked for WFIL Radio and Television in Philadelphia.

Q. Will you state whether or not your radio and television service covers Bucks County?

A. Yes.

Q. And will you state whether or not you have any—strike that. What was your position at the time at the station?

A. I was Promotion and Advertising Manager of the station.

Q. Will you state whether or not your station carried any news items of the Feasterville killing as well as the trials?

A. I can not so state definitely, no sir.

Q. Do you have any films or records pertaining to either the killing or to the participants?

A. I have some fragmentary films which I brought along, asked for (268) in the subpoena. We are required to keep our records only for five years for the Federal Communications Commission. We have no other records. I can not tell what appears on the films. I have the films with me. They may or may not relate to this.

Q. How many films have you?

A. I have two.

Q. Will you please produce them? (Witness produces films.)

Are these films for the radio or television?

A. Television.

Q. Do you individually recognize any of the persons in these films?

A. No sir, I do not.

Q. Do you remember having any record showing what was said by your Television Company in connection therewith?

A. No.

Q. Do you know whether they were shown by your Television Company?

A. They were shown on our television newsreel.

(Exhibits marked "Relator's Exhibits Nos. 112 and 113," respectively.)

BY MR. MARGIOTTI: These films, Your Honor, have been marked only for identification; one is marked "Relator's Exhibit No. 112," and the other is marked "Relator's Exhibit No. 113" only for identification.

BY JUDGE MURPHY: Is there any living person, so far as you know, as of this moment that knows anything about what is in those films?

BY MR. MARGIOTTI: Yes.

BY JUDGE MURPHY: Where is he?

(269) BY MR. MARGIOTTI: He is in the Court.

BY JUDGE MURPHY: All right.

BY MR. MARGIOTTI:

Q. Will you state what was the date of "Relator's Exhibit No. 112"?

A. 12/23/47.

Q. What was the date of "Relator's Exhibit No. 113"?

A. It is marked on the paper inside January 21, 1948.

Q. Do you have any other papers in connection with this matter, ads or otherwise?

A. I have a photostat of a story that appeared in the Philadelphia Inquirer that I was asked to bring.

Q. Let me see it.

A. I think it might clear something up—these are silent films although the photostat says sound.

BY JUDGE MURPHY: Are they the kind there is sort of a running commentary by the person on the station and then he puts the picture on the screen?

BY THE WITNESS: Yes, Your Honor.

BY JUDGE MURPHY: Do you have with you the running commentary?

George A. Koehler, Direct

BY THE WITNESS: No.

BY JUDGE MURPHY: Were you asked to bring it here?

BY THE WITNESS: Yes.

(270) BY THE COURT: Did you bring it?

BY THE WITNESS: No. We are not required to keep it after five years.

BY JUDGE MURPHY: So that what we have here is a film that appeared on the screen without a running commentary?

BY THE WITNESS: That is correct.

BY JUDGE MURPHY: A person almost has to own a television to keep up with things.

BY MR. MARGIOTTI: The paper which the witness has produced, being a photostat of the Philadelphia Inquirer which he says, is only marked "Relator's Exhibit No. 114" for identification.

(Exhibit marked "Relator's Exhibit No. 114.")

BY MR. MARGIOTTI: That is all.

CROSS-EXAMINATION

BY MR. VAN ARTSDALEN:

Q. Mr. Kochler, you don't know personally yourself whether any of these films relate in any way to the Darcy case?

A. No. I saw them before I came up here. I know what they are. I recognized only the late Mayor of Philadelphia, Bernard Samuel. Then I recognized none of the other persons.

Q. Are these full fifteen-minute films?

A. No. I would estimate the smaller reel

Q. "Relator's Exhibit No. 11²"

A. That is correct. — runs probably fifteen or twenty seconds, and the other one runs probably one and one-half of two minutes.

(271) Q. And you say that you know that these were put on your television, is that correct?

A. Yes.

Q. Do you know what time?

A. No, I don't. The photostat states 8:00 P. M., but I am not certain.

Q. You don't know yourself?

A. No sir.

Q. How do you know they were put on at all?

A. Because they were in the file records, the only files we keep beyond five years, in the larger can for that date.

Q. You yourself have no recollection of having seen the films put on?

A. I do not.

Q. You don't have any way of knowing how many television sets were turned on at the time the film was shown, do you?

A. I could estimate but nothing beyond that.

Q. It would only be an estimation, is that correct?

A. Yes.

George A. Koehler—Re-direct

BY MR. VAN ARTSDALEN: That is all.

BY JUDGE MURPHY: It would be an estimation from the very statement and hope that it was a large number.

BY THE WITNESS: It wouldn't be a large number then, Judge.

BY JUDGE MURPHY: That was back in 1948. The concern would be what was the television reception in Bucks County? And certainly it is better—if they have anything better—the Crossley people (272) or the television people have any records—it might be a better situation, if it is helpful at all, than this gentleman's opinion of what the number of television-viewers were in 1948.

RE-DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Was your station strong enough to cover all of Bucks County?

A. Yes. My geography isn't very good. We had broadcast over a radius of fifty miles from Philadelphia.

BY MR. MARGIOTTI: That is all.

(Witness excused.)

William A. Lynch - Direct

MR. WILLIAM A. LYNCH, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI:

Q. Mr. Lynch, where do you reside?

A. New Britain, Pennsylvania.

Q. What do you do?

A. I am a Station Manager of Radio Station WBUS, Doylestown.

Q. Located at Doylestown?

A. Yes, it is, sir.

Q. It is strictly a radio station?

A. Yes.

Q. No television?

A. No.

Q. Will you state during the time of the Foster-Zietz trial whether or not you broadcast any of the proceedings of that trial, or conclusion?

A. I can not state that I know that we did; I can only presume, sir.

(273) Q. How about the Darcy trial?

A. It would be the same there, sir. I might explain, if I may, that we had gone on the air May 20. I understand the Foster-Zietz trial started May 24, and since we are a very small station, a very small staff, I know we were very, very busy at that time and didn't have a full-time news writer to go out and cover a trial and the nature of the radio work we would not even—even now—have anybody a whole day to cover one trial. That is the nature of radio news.

Q. Where do you get your news when you do broadcast it?

A. Now we have a news writer and we subscribe to the Associated Press and work that age-old radio and television slogan, "Work over the competition," radio station and so on.

Q. Do you know whether or not there was any radio broadcast done at all, according to the records?

A. I could not say yes, there was, or I could not say no, there wasn't. I would assume that we did carry it.

Q. I think that is right.

BY JUDGE MURPHY: Have you any more questions?

BY MR. MARGIOTTI: All right, cross-examine.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Your radio station had gone on —

BY JUDGE MURPHY: Are you going to ask questions when the gentleman says all he can do is indulge in a presumption?

BY MR. MARGIOTTI: Assumption.

(274) BY JUDGE MURPHY: Presumption first, assumption second; and he hasn't assumed or presumed, so there is no evidence so far.

BY MR. VAN ARTSDALEN: No questions.

(Witness excused.)

MR. WALTER SCHROEDER, recalled.

RE-DIRECT EXAMINATION (Continued)

BY MR. MARGIOTTI:

Q. Mr. Schroeder, did you bring with you the minutes of the Court of Quarter Sessions, Oyer and Terminer?

A. Yes sir, I did.

Q. And in these minutes do you find—is there a reference to the term of court, what is meant by the term?

A. The term of court is the term of court that is designated on a calendar that the court puts out the beginning of any specified year. In 1948 the term of court started on May 18, 1948 when a grand jury was summoned to appear.

Q. How long did that term run?

A. That term would run to the next grand jury summation, which would be in September 1948.

Q. Then your terms ran about every month with the exception of during the summer months, and the May Term extended to September, is that it?

A. That is true.

Q. Now these minutes that you have produced are the minutes of the Zietz-Foster trial as well as the Darcy trial, is that not right?

A. Yes sir; they cover that period.

Q. Yes. These minutes show whether or not Judge Boyer presided with (275) Judge Keller during the Darcy trial?

BY MR. VAN ARTSDALEN: I object. The record speaks for itself.

BY MR. MARGIOTTI: First, I want to know the question. Then if they do——

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BY JUDGE MURPHY: The objection is sustained. We think the investigation ought to take place elsewhere than in Court. The best evidence so far is the transcript itself that is before us, and it shows Judge Boyer on the bench or in consultation at sidebar. If the question is is there some minute in that showing that, we will permit the witness to answer if he knows.

BY THE WITNESS: I don't know.

BY JUDGE MURPHY: I might say that it may help to bring this matter to a head that the minutes that are already introduced in evidence of the Foster-Zietz case show Judge Boyer and Judge Keller sat on the first day—on the first day of the Foster-Zietz, Judge Boyer started, then it shows the day the confession was up Judge Boyer and Judge Keller sat through the Zietz case; then it shows Judge Boyer and Judge Keller sat the day the Darcy case started; it then shows Judge Keller sitting each day after that; then it shows one day apparently when Judge Keller and Judge Boyer sat together again. That is what the minutes show that have been introduced so far.

BY MR. MARGIOTTI: These minutes seem to show they sat together other days during the trial.

(276) BY JUDGE MURPHY: If they do, then we will go into it.

BY MR. MARGIOTTI: I am satisfied.
I wish at this time to introduce in evidence the minutes strike that.

BY JUDGE MURPHY: We understand that counsel has

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already said now he has some minutes that show a variance between the minutes already introduced in evidence as to the presence of Judge Boyer and Judge Keller together and we certainly want to see them if there are any.

BY MR. MARGIOTTI:

Q. What book is this?

A. It is a criminal minute book 1948-2.

(Exhibit marked "Relator's Exhibit No. 115.")

BY MR. MARGIOTTI: We have marked it for the purposes of identification only. It is "Relator's Exhibit No. 115."

If the Court please, at this time I offer in evidence Page 7 of the minutes, which is merely a reference to the case and the record of the case showing the results thereof; Page 8 of the minutes which shows the minutes for each particular day; and Page 9 thereof which shows that—the same thing and particularly shows that Judge Keller and Judge Boyer presided at 10:00 o'clock in the morning —

BY JUDGE MURPHY: What day is that now?

BY MR. MARGIOTTI: June 7.

(277) BY JUDGE MURPHY: June 7?

BY MR. MARGIOTTI: Yes.

— and there is nothing to show that there was any change in the personnel of the Court; on June 8 it shows the Court called at 9:30 A. M. with Judge Keller and Judge Boyer presiding. —

BY JUDGE MURPHY: What time?

BY MR. MARGIOTTI: 9:30, Judge.

— June 9, Court called at 10:00 o'clock A. M. with Judge Keller and Honorable Calvin S. Boyer presiding. It gives a record of the day and does not show any change in the personnel of the Court; June 10 we have the Court convening at 10:00 o'clock in the morning with Judge Keller and Judge Boyer presiding; June 11 it shows Judge Keller and Judge Boyer presiding without any change of personnel during the day; June 12 at 10:00 o'clock in the morning, Judge Keller and Judge Boyer presiding; the Court adjourned at 11:13 A. M. until Monday, June 14, 1948; June 14 Court called at 10:00 o'clock with Judge Keller and Judge Boyer presiding.

BY JUDGE MURPHY: I might say that the other minutes you put in are exactly the contrary.

BY MR. MARGIOTTI: I don't know that they are the contrary.

BY JUDGE MURPHY: Well, here they are, "Exhibit No. 4."

BY MR. MARGIOTTI: (278) Those are the minutes that they keep down there. I am not responsible for them.

BY JUDGE MURPHY: I just call it to your attention.

BY MR. MARGIOTTI:

Q. Who keeps this particular record?

A. One of the personnel in the Quarter Sessions office.

BY JUDGE MURPHY: I might say, sir, if you look into the practice of Court you will find that this Court runs minutes

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that say on a certain day—and reports go to Washington—on certain days Judge Watson and Judge Murphy sat, but this is the first case we sat in the same case, in about one out of seven years. It may be those are general minutes saying on that day Judge Boyer sat in one courtroom and Judge Keller in another on different business. However, if it is on this case as such, then one minute book contradicts the other.

BY MR. MARGIOTTI: We propose to call some witnesses who were there and observed what went on. All we can do is present the records.

BY JUDGE MURPHY: Call the witnesses in view of the conflict.

BY MR. MARGIOTTI:

Q. Who made this particular record?

A. I don't remember. It is over six years ago. I can't remember whether one of the other personnel or I made it. I don't remember.

BY JUDGE MURPHY: Don't you have the practice in this Court you have minute sheets and somewhere in the Clerk of the Court's office you have a file that shows the original papers of what occurred there?

(279) BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: Now then, following that up, then later on when they have time they get the single sheets out on the typewriter, minutes accumulated for two or three weeks, get caught up, put them in bound form.

Do you have the original papers, or do you destroy them?

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BY THE WITNESS: The papers from the actual trial I have them papers in my case over there. I will look to see.

BY JUDGE MURPHY: At least in Lackawanna County if you go to the Clerk's office and go to the file you will find some papers. Over in the Courts you will find some. Other courts give you an inkling of what is in that paper.

BY MR. MARGIOTTI: At this time I offer in evidence Pages 7, 8, and 9 of "Exhibit No. 115."

BY MR. RYDER: The offer is objected to on the particular ground the offer consists of original records of the Bucks County Court. It is also objected to on the ground it has not been properly proved.

BY JUDGE MURPHY: It certainly has not been properly proved. Here are records which would appear to contradict each other, and if they came from the same source, there ought to be proof of what actually happened. It would seem there would be some question whether they wouldn't conflict per se with the United States (280) rule that was changed as a result of what happened in this courtroom, business entries.

Your objection because of the original records, that objection is overruled in that regard. We will receive the book as is subject to the right to substitute in lieu thereof photostatic copies or certified copies of the contents of certain pages. Meanwhile the books remain in the custody of the Court. But we think there should be evidence to explain what counsel points out to me, an apparent variance between one court record and the other.

BY MR. MARGIOTTI: I agree with Your Honor, and if we can get that evidence we are going to introduce it.

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BY JUDGE MURPHY: However, we will receive it for the time being subject to the objection so that the Court can examine it to see if we can bring order out of what would seem to be minor chaos.

BY THE WITNESS: I had these original papers on the 11th. When I was summoned I brought them in. I brought them in as I was directed on that day.

BY MR. MARGIOTTI:

Q. What is the difference between the docket entries and the minute book?

A. The docket entries are more of a complete summation of the whole particular case than what the minute book is. The minute book is a matter that takes into consideration listing of cases, dispositions and any other matters in the way of orders, termination of any case handled in the Court of Quarter Sessions on any particular day.

(281) BY MR. MARGIOTTI: May I ask you this: In that exhibit, the last exhibit of the minutes, there is a reference frequently the court convened at a certain hour with Judge Keller and Judge Boyer presiding. That was during the Darcy trial. Now, what does that refer to?

BY THE WITNESS: It means that at the convening of court every morning we enter on the minutes that both judges were present on the bench at that time.

BY JUDGE MURPHY: Assuming you have a murder case and on the opening day the both judges sat and then one judge goes on with the murder case, is it the practice in your court for both judges, notwithstanding there is only one judge handling the case, to come in and sit in open court?

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BY THE WITNESS: Both judges open court and one judge will be assigned to his courtroom and if he has a case going he will leave and go upstairs.

BY JUDGE MURPHY: Assuming he is assigned to the case taking a week, do they still open court each day notwithstanding the other case is going on?

BY THE WITNESS: They have a general opening every morning at 10:00 o'clock.

BY JUDGE MURPHY: Even though one judge is assigned to the case you have an opening with both judges each morning in your County?

BY THE WITNESS: (282) That is correct.

BY JUDGE MURPHY: They still do it?

BY THE WITNESS: Yes sir, they do.

BY MR. MARGIOTTI:

Q. Then let's take, for instance, here on June 7 where your notation is at 10:00 o'clock Judge Keller, President Judge, and Judge Boyer presiding. What does that mean?

A. It means on that particular day at the convening of court they were both sitting on the bench.

Q. And if either one of them left during the day, would you record that the judge left the bench?

A. We would have it recorded in our general criminal docket that that judge was sitting on the case on that particular day other than the entry that you might read in that minute book. I can show you a list that period covers where one judge pre-

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sided at a jury trial during the time this murder case was going on.

Q. Here; for instance, let's take this one day; I want to get the formula. "Court called at 10:00 o'clock A. M. Honorable Hiram H. Keller, President Judge, and Honorable Calvin S. Boyer presiding." You say that means they were both there at the opening of court?

A. That is right.

Q. All right. Now "Eo Die . . ."—meaning same day, " . . . Court recessed at 12:02 until 1:30 o'clock P. M." Where were these two Judges, according to this record, between 10:00 o'clock, when they convened, and 12:02—according to this record?

BY MR. VAN ARTSDALEN: I object. The record should speak for itself.

(283) BY JUDGE MURPHY: Is there anything to indicate where they were?

BY MR. MARGIOTTI: There is not.

BY JUDGE MURPHY: Do you know where they were back in 1948 between 10:00 o'clock and 12:00 o'clock?

BY THE WITNESS: I do not know. I can find it in the other docket whether one Judge was sitting on another case or not.

BY MR. MARGIOTTI:

Q. You can find that out. Which docket?

A. Filed cases followed up before final minutes are in there. For instance —

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BY JUDGE MURPHY: I might say that what the witness has said and what this record purports to show, according to counsel, is at variance with the docket entries and at variance with the transcript of the trial.

BY THE WITNESS: For instance, here on June 11, which, I believe, is a period during one of the murder cases, Judge Boyer is sitting in a plead-guilty matter in another courtroom. He opened up court that morning sitting with Judge Keller on the bench.

BY MR. MARGIOTTI:

Q. And can you tell us from this record what time he left Judge Keller and went to the other courtroom to take pleas?

A. No sir.

Q. Is there any record that would show that?

A. No, there isn't.

(284) BY JUDGE MURPHY: We might call attention of counsel to Page 1 of the book in question. It shows on May 25 some judge sentencing somebody to three months to one year—on May 25 while Zietz is on trial. May 24, court orders and directs Anthony Matteuci to pay the costs. Here's another one: Sentence suspended before Judge Keller on May 24. Here's May 26, plea of guilty in another case before Judge Keller. Here's—then they have a May 18 entry after May 27. The first entry is May 25; the second entry is May 24; the third entry is May 24; then there is May 18; then there is May 18; then the next one is May 24; then that goes over to June 11; then there is July 7. Well, we will go through it.

BY MR. MARGIOTTI:

Q. Mr. Schroeder, you said there was an envelope that con-

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tained some original notes. Are those the original notes upon which you made your notations and from which you made your final notations in the record which His Honor now has before him?

BY MR. VAN ARTSDALEN: I object to the word "you."

BY JUDGE MURPHY: Did you make those notes in there in your own hand?

BY THE WITNESS: No, I didn't.

BY JUDGE MURPHY: Did you make those entries in this book in which you were questioned?

BY THE WITNESS: I don't recall.

BY JUDGE MURPHY: (285) The objection is sustained.

BY MR. MARGIOTTI:

Q. Will you state where you got those papers here before you?

A. I got them out of the original minutes that we had on file in our office for that particular term of court, May Term of Court 1948.

Q. Are those papers regularly kept in the business of that office?

A. Correct.

Q. Part of the records of that office?

A. That is right.

BY JUDGE MURPHY: I might say to you, sir, Page 7 offered in evidence the first item is dated June 28, 1948 and

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refers to something—a case in 1946, and after the June 28 entry is a June 4 entry of 1948, a verdict of guilty in the Zietz-Foster case, and that is in between the June 28 entry and the June 14 entry and this is June 4 in the middle, which seems to conflict with the docket entries in the Darcy case.

BY MR. MARGIOTTI:

Q. I ask you now whose handwriting those notes are in?

A. I don't remember.

BY MR. MARGIOTTI: If the Court please, at this time we offer in evidence the papers which the witness has in his hands and which we will have marked, with the permission of the Court, for identification. I will state the purpose as soon as it is marked.

Will you just hand them to Mr. Butler?

(Exhibit marked "Relator's Exhibit No. 116.")

BY MR. MARGIOTTI: If the Court please, we now offer in evidence these (286) original sheets, which are part of the records of Bucks County and contained in the Clerk's office and are the sheets from which the various entries have been made, and these sheets will show that Judge Boyer presided with Judge Keller on June 7, June 8, June 9, June 11, and June 12—pardon me—June 7, June 9, June 11, and June 12.

BY MR. RYDER: The offer is objected to as incompetent.

BY JUDGE MURPHY: The objection is sustained.

The Court has before it the transcript of the proceedings of the Foster-Zietz trial. We have before us the proceedings of the Darcy trial, the actual stenographer's transcript, that was

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offered heretofore by the Relator; the minutes or docket entries as to each trial; the transcript in the Darcy trial; and the docket entries and the transcript are both at variance with what the gentleman says is in the papers before him; and the book that was offered in evidence as "Exhibit No. 114," shows on Pages 8 and 9 starting with May 17 and over to June 14 Judge Boyer and Judge Keller presiding. The gentleman contends that is presiding at the same trial, so it has Judge Keller and Judge Boyer presiding at the Foster-Zietz trial throughout and at the Darcy trial throughout. In the same book it shows some judge sitting on a jury trial and taking verdicts in another case.

Until those minutes are further identified, we will take them subject to the objection so that they will be here for the Appellate Court.

BY MR. MARGIOTTI: May I add to my previous motion—my offer—June 14 also. I gave the dates when they presided together in the Darcy trial, (287) and he has given me June 14 too. I don't know but that the trial was over at that time.

BY JUDGE MURPHY: You have the evidence, according to this book, that they presided together at the same time that you have already offered the newspaper item with one judge in one court and one in another.

BY MR. MARGIOTTI: That could happen, presided together for awhile and one judge leaving the bench for awhile and coming back.

BY JUDGE MURPHY: No question about that. A lot of things could happen.

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BY MR. MARGIOTTI:

Q. Mr. Schroeder, will you please look at your notes and tell us what they show about who presided at the Darcy trial on June 7, 1948?

BY VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We have taken the papers subject to the objection. The notes have been described as your notes. We take it it means your; they are notes which the witness said came from the Clerk's office which may or may not comprise all of the papers. They are what he found there and took here and prepared by somebody else of which he has no personal knowledge. We will take the answer subject to those conditions.

BY MR. MARGIOTTI:

Q. Did you hear what the Court said, Mr. Schroeder?

A. I heard part of it, not all of it.

Q. Tell us what it is as of June 7.

A. June 7, the clerk's sheet here on Indictment 37, February Term (288) 1948 —

BY JUDGE MURPHY: Do you recognize the handwriting on the paper?

BY THE WITNESS: No, I do not.

BY JUDGE MURPHY: How many were working in the Clerk's office in June 1948?

BY THE WITNESS: There were—there was one woman by the name of Mattes; a man, Chief Clerk, Godshall; a Deputy Clerk, Wambold, and myself.

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BY JUDGE MURPHY: Are they in your handwriting?

BY THE WITNESS: They are not in my handwriting.

BY JUDGE MURPHY: You don't identify the handwriting of any of your co-workers that any of those papers are in?

BY THE WITNESS: Well, from the general appearance it is a little difficult. They don't look similar to me. I am no handwriting expert. They look like Miss Mattes.

BY JUDGE MURPHY: Is she living?

BY THE WITNESS: She is.

BY JUDGE MURPHY: Is she available?

BY THE WITNESS: I don't know. She has left the office. It looks like (289) her writing.

BY MR. MARGIOTTI:

Q. Whose writing?

A. It looks like Miss Mattes' writing.

Q. It looks like Miss Mattes' writing. All right, tell us what this shows as to who presided at the Darcy trial on June 7, 1948.

BY JUDGE MURPHY: Read exactly what the notes show.

BY THE WITNESS:

A. "1948 June 7—Court called at 10 o'clock A. M. Hon. Hiram H. Keller, P.J. and Calvin S. Boyer, J., presiding.

"Eo Die—The Defendant, David Darcy being present in

Open Court and being represented by his Counsel, Webster A. Achey, the District Attorney moves to have the Def. arraigned.

"Eo Die—The Defendant being arraigned the Crier reads the Bill of Indictment to the Defendant, to which the Defendant pleads 'Not Guilty' to be tried by 'God and My Country.'

BY JUDGE MURPHY: Let me say the docket entries show the same thing, June 7, both judges were there. That is before he goes to a jury trial.

BY MR. MARGIOTTI:

Q. Now on June 8, 1948, look what is entered there for June 8, that is the next day.

A. "1948 June 8—Court called 9:30 A. M. Hon. Hiram H. Keller, P.J.

"Eo Die—Defendant, David Darcy being present in Open Court with his Counsel, Webster Achey and William Power. The Court directs the trial to proceed, and a jury to be sworn."

BY JUDGE MURPHY: We understand that the witness read there was only one (290) judge in that case. That is on the 8th. That is what the docket entries show.

BY MR. MARGIOTTI: That is right. I think we agree on that.

Q. June 9.

A. "6/9/48 Court Called at 10:00 A. M. D.S.T. Hon. H. H. Keller P.J. and Hon. Cal. S. Boyer J. Presiding. Court notices that Prisoner and his Attorney's are in the Court at 10:10 A. M. D.S.T. District Atty. Edward Biester opened his Charge to the Jury at 10:11 A. M. D.S.T."

Q. All right; June 10.

A. "6/10/48 Court Called 9:30 A. M. D.S.T. Hon. H. H.

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Keller P.J. Presiding. Court notices that the Def. and Counsel are in Court. Wit: Corwin Hughes (S) Edward Wunsch (S) Winnie Lewtwyler (S) Frank Fronsedale (S). Court Recessed for 10 Minutes at 10:55 A. M. D.S.T. Court notes that the jurors are in their Places in the jury Box. Court notices that the Def. and his Attorney are in court. Wit: Frank Fronsedale (Rec) Virginia Stickel (S) Elmer Waldeck (S) Maurice Phillips (S)."

Q. All right; June 11, 1948.

A. "6/11/48 Court called at 10:00 A. M. D.S.T. The Hon. H. H. Keller, P.J. and Calvin S. Boyer Presiding. Court notes that the Def. and Counsel are in Court. Wit: Dr. Charles Laycock (S) Dr. John C. Simpson (S) Alan Hellerman (S) (Court Grants the Witness to be Sworn in Wheel chair) Dr. Michael Scott (S) Court recessed for 10 Minutes at 10:57 A. M. D.S.T. Court conv. at 11:07 A. M. D.S.T. . . ."—I can't make the word out—" . . . at 11:07 A. M. D.S.T. Court notes that the Def. and Counsel are in Court."

Q. Now, all right, June 12, 1948.

(291) A. "6/12/48 Court Called at 10:00 A. M. D.S.T. The Honorable H. H. Keller P. J. and Hon. C. S. Boyer Presiding. Court notes Def. and Counsel are in Court. Wit. Lt. John J. Hanlon (Rec) Def. Atty. objects to the oral statement #71 Objection over Ruled. Def. Atty call upon the Comm on Proof of the Said Document. Def. Atty ask for Proof of Oral Statement #73 Object over Ruled by Court. Def. Atty object to Reading of the last part of the Document Objection sustained By the Court. Def Atty. Wants a Juror Removed as the testimony is not Relative of the case Court Over Ruled the objection Def. Excel . . ."—I don't know what it means. " . . . Wit: Keith R. Dane P.S.P. (Rec) Comm. Rest at 11:12 A. M. D.S.T. Def. Rest at 11:13 A. M. D.S.T. Jury Excused until Monday June 14 1948 at 10:00 A. M. D.S.T."

Q. Will you tell us what June 14 shows?

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A. "6/14/38 Court Called at 10:00 A. M. D.S.T. Hon. H. H. Keller P.J. and Hon. C. S. Boyer J. Presiding. Court notes that def. and Counsel are in Court and jury in Box. Dist Atty Edward Biester started his Summations at 10:12 A. M. D.S.T. D.A. Edward Biester End his Summations at 10:56 A. M. D.S.T. Court Recesses for 10 Minutes at 10:57 A. M. D.S.T. Clerk notes that the Def and Counsel are in Court and jury are in there Seat. Def. Counsel Mr. Achey Starts his Plea to the jury at 11:06 A. M. D.S.T. Def Counsel closes Plea at 11:42 A. M. D.S.T. Comm. Waves the right to rebuttal. Prisoner remanded to Custody of Sheriff at 11:45 A. M. D.S.T. Court Recesses at 11:45 until 1:30 P. M. D.S.T. Jury in Custody of Proper officials. Court Conv. at 1:30 P. M. D.S.T. Clerk notes that the Prisoner and Counsel are in the Court at 1:30 P. M. D.S.T. The Court Started his charge to the Jury at 1:31 P. M. D.S.T. Court Ended Charge at 2:38 P. M. D.S.T. 2 Alternate..."

(292) Q. That is all. I don't care about the alternate jurors.

BY JUDGE MURPHY: We now have the situation where a paper prepared by someone to the Court unknown, has been read into the record and it shows on June 7, June 8 and June 12 agreement with the official transcript and the docket entries; on June 9, on June 10, on June 11 and June 14 the contrary of the Court transcript and the docket. If that person is living and available who can throw light on the discrepancies—there is apparently a contradiction as counsel for the Relator, at least, interprets it, there is a contradiction of the official transcript and there is a contradiction of the official docket entries, both of which we take it, went to the Supreme Court of Pennsylvania, both not speaking the truth, according to that paper there. There is a presumption of law ordinarily that court records are correct. There seems to be some conflict. It ought to be explained. We think the burden is on the Relator.

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BY MR. MARGIOTTI:

Q. Here is two sheets written in pen and ink. Will you tell me if you recognize them?

A. I do not. They are not part of the official record.

Q. They are not part of the official record?

A. No, they are not part of the official record.

BY JUDGE MURPHY: How did they get there? Who put them there; do you know?

BY THE WITNESS: Most likely—I don't know.

BY JUDGE MURPHY: Did you bring them up here?

(293) BY THE WITNESS: Yes, I brought them up here.

BY JUDGE MURPHY: Where did you get them?

BY THE WITNESS: I got them in the office of Quarter Sessions and I gathered the papers from various sources and I might have misplaced a couple.

BY JUDGE MURPHY: These papers have something to do with something else?

BY THE WITNESS: I don't know.

BY JUDGE MURPHY: Where did you get them and why did you put them in the record?

BY THE WITNESS: I didn't put them in the record.

BY JUDGE MURPHY: Who did?

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BY THE WITNESS: I put them in the envelope but I didn't consider them part of the record.

BY MR. MARGIOTTI:

Q. When you went for that envelope did you put these two papers in the envelope or did you find these in the envelope?

A. I found them with a number of papers in the Quarter Sessions office when I was trying to find this evidence. It has been circulating around for six years—pretty hard to estimate during the period, the time involved. And I tried to do as best I could (294) under the circumstances. The papers there I gathered up and I put them in by mistake.

BY MR. MARGIOTTI: I will show them to the Court.

Q. I am going to show you two other papers—

BY JUDGE MURPHY: Just one minute, please!
It looks like high-class doodling.

BY MR. MARGIOTTI: Judge, the only reason I called it to his attention is I didn't think it belonged in the envelope.

Q. And I am going to call your attention to two more papers and ask you whether or not they were in the envelope?

A. This is the first I noticed them. May I make an explanation?

BY JUDGE MURPHY: I wish you would explain this doodling and why you put it in this envelope.

BY THE WITNESS: Some of the papers have been before the various courts and they were over in the District Attorney's

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office and in my haste to organize these various transcripts in regard to this case I had to go around different sections of the office of the District Attorney and so on in order to assemble these. I guess in my haste to bring this record, transcripts, up to the Court I grabbed ahold of some things—I grabbed ahold of some things by mistake.

BY JUDGE MURPHY: You took papers ~~hither~~ and you and put them in with the same papers that should have been kept in the ordinary course of business—let me see the paper. The paper in question seems (295) to be talking about newspaper headlines, what the newspaper headlines had to say; then an item that "Darey will know sometime today whether he will be the third boy-bandit to be scheduled for death or whether he will escape with life imprisonment." Then there is a description of Judge Biester's summation, and Judge Biester didn't become a judge for some months after and this describes him as a judge.

BY MR. MARGIOTTI: It shows whoever wrote that wrote it after Judge Biester was a judge and was making notes for his own purpose. I don't think it is part of the record. That is the reason I called it to the attention of the witness because, in all fairness, I don't think it should be in that envelope. I call that to the attention of the Court. The same thing applies to the two papers that is now in his hand.

BY JUDGE MURPHY: Is that part of the record?

BY THE WITNESS: I didn't have a chance to go over these papers until this morning. I didn't believe they would be submitted.

BY JUDGE MURPHY: Will you look at the paper in your hand? Would that be part of the record?

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BY THE WITNESS: No sir, that would not be part of any record.

BY JUDGE MURPHY: Do you know if those two papers the Court read from were in that envelope when you took it to Scranton?

BY THE WITNESS: No.

(296) BY MR. VAN ARTSDALEN: I feel there is an explanation due to the Court on this matter. When these were shown to me they appeared to be in my own handwriting. I examined the papers which Mr. Schroeder now is being examined on sometime in the office of the Clerk of Quarter Sessions and apparently I left these notes here and inadvertently Mr. Schroeder picked them up. They are my personal notes and were made approximately a week ago.

BY JUDGE MURPHY: Are these your papers too?

BY MR. VAN ARTSDALEN: I don't know.

BY JUDGE MURPHY: Now here's a paper "Experienced attorney's opinion jurors which was most fair to the defendant."

BY MR. VAN ARTSDALEN: It is possible. I am not sure of that. I believe that was notes that were possibly made a short time ago by one of our County Detectives that was looking at the records.

BY MR. MARGIOTTI: May I hand him these two papers because they don't belong in the record?

BY JUDGE MURPHY: He already has them in his hand.

Mr. Walter Schroeder—Re-direct

BY MR. MARGIOTTI:

Q. With reference to the papers that are left, is there any left that doesn't belong in that envelope, anything more of notes of yours?

A. This paper does not belong in there. It is from one of the ends of the transcript.

BY JUDGE MURPHY: (297) That doesn't belong in there; that is part of the transcript?

BY THE WITNESS: That is right. That is all that apparently belongs in there.

BY JUDGE MURPHY: In all fairness to the witness, so the Appellate Court will understand, this gentleman was in this Courtroom yesterday at adjournment time, at least we think we recall seeing him in the room, at least we recall seeing him yesterday afternoon; and apparently he left here sometime yesterday afternoon or last night to accommodate defense counsel to comply with their request and went down to Doylestown, which is some geographic distance from this Court and returned and was here apparently this morning, and apparently the offices to which he tried to get access were closed. He was a busy man. So if he brought up other things, that may be an explanation.

BY MR. MARGIOTTI:

Q. Is there anything else in there that doesn't belong in that envelope that you know of?

A. No.

Q. What is that thing that you are sticking in your pocket?

A. That is a subpoena.

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Q

Q. Put it back in, Mr. Schroeder.

BY JUDGE MURPHY: Let's see it. There is a sinister implication there, probably not meant.

Is this the subpoena that you got which you were going to put into your pocket?

BY THE WITNESS: (298) Yes sir.

BY JUDGE MURPHY: Was it the subpoena that was served by the Relator?

BY THE WITNESS: Yes.

BY MR. MARGIOTTI: O.K. That is all.

RE-CROSS EXAMINATION

BY MR. VAN ARTSDALEN:

Q. Mr. Schroeder, was it not the practice in May and June 1948 at the opening of each session of court both in the morning and noon for both of the Judges to come in and sit on the bench?

A. That is true.

Q. And was it not also the practice at that time and still the practice that at both the morning and afternoon sessions the attorneys would hand-up any miscellaneous papers they had to hand up in certain matters pertaining to Quarter Sessions, Over and Terminer, Common Pleas?

A. That is right.

Q. Isn't it also true very frequently after the miscellaneous matters were heard the Court would split up or one of the Judges would go off the bench to attend other matters?

A. That is right.

Q. Is it not also true that in this minute book it describes that when both Judges came in and would sit on the bench at the opening session?

A. That is right.

Q. Now then, if one of the Judges went off the bench during the course of the morning or afternoon session, is it not also true the minutes would not show that?

(299) A. That is true.

Q. So that those minutes would only indicate whether both Judges came in at the opening session?

A. That is right.

Q. But one of the Judges might have left the bench at any of those periods of time and the minute book would not show that, is that right?

A. That is right.

Q. Now then, in the Oyer and Terminer Docket, which is "Relator's Exhibit No. 10," in that docket where it indicates as to a certain trial a certain Judge presided; is it not correct that that would indicate which Judge was actually sitting on the bench during that trial?

A. That would.

Q. Now, of course, Mr. Schroeder, I believe you testified yesterday as a matter of fact you were not personally in court during the Foster-Zietz or the Darcy trial, to your knowledge?

A. Just on business matters where I had to call somebody in the office for telephone calls or something of that nature.

Q. You were not the Clerk?

A. I wasn't the Clerk.

BY MR. VAN ARTSDALEN: That is all.

(Witness excused.)

BY JUDGE MURPHY: All right, we are going to recess

now until 1:30. At 1:30 we will return, then go to 2:30. At 2:30 we will adjourn. That is why we are taking—we will adjourn then until next week. We will fix a definite time next week when we will continue this proceeding. Recess until 1:30.

(300) (Recess.)

(Court resumes after the recess at 1:40 P. M. with all the parties, including the Relator, David Darcy, present in the courtroom.)

MR. HOWARD R. PRICE, called and sworn on behalf of the Relator, on direct- and cross-examination, testified as follows:

DIRECT EXAMINATION.

BY MR. MARGIOTTI: ..

Q. Mr. Price, where do you reside?

A. Presently at Charlottesville, Virginia.

Q. Did you ever live in Bucks County?

A. I did.

Q. When did you live there?

A. April of 1944 to December 29, 1952.

Q. I see. During that period did you live there continuously?

A. I did.

Q. And when you were living in Bucks County where did you live, Mr. Price?

A. From 1944 until 1951 I lived in Andalusia, Bucks County.

Q. And how big is that, Andalusia, approximately?

Howard R. Price—Direct

A. Oh, of course now it is larger than it was.

Q. How big was it then?

A. Oh, I would guess the population of Andalusia was between two and three thousand.

Q. I see. And what did you do; what was your occupation?

A. Salesman selling automotive parts, wholesale parts for cars, to automotive distributors in the area.

Q. Who were you working for.

A. William O. Cattle of Philadelphia.

Q. Will you state whether or not your duties as a salesman took you (301) out of Andalusia to various parts of Bucks County?

A. They did.

Q. What parts?

A. I had customers in Doylestown, Bristol and Sellersville and I traveled through the County in my work which would take me to Easton and other places north and west of the County.

Q. Did the time come that the killing at the Feasterville Inn came to your attention?

A. I am sorry, I didn't get that.

Q. Did the time come that the killing at the Feasterville Inn came to your attention?

A. Yes sir, it did.

Q. And how was it brought to your attention?

A. Initially by the newspapers.

Q. What newspapers?

A. The Bristol Courier to which we subscribed, the Philadelphia Bulletin and the Philadelphia Inquirer.

Q. Now after that time and until—strike that. Do you remember the Zietz-Foster trial?

A. Yes sir.

Q. And the Darcy trial thereafter?

A. Yes sir.

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Q. After the killing was brought to your attention and up to the end of the Foster trial, will you state whether or not you continued your activities along the line that you have already indicated to the Court?

A. I did.

Q. And in traveling throughout Bucks County will you state whether or not you came in contact with citizens of that County?

A. I did.

(302) Q. And in these contacts will you state whether or not there were conversations with you, Mr. Price, and various citizens concerning the Feasterville killing and the defendants?

A. There were.

Q. And to what extent?

A. To a great extent.

Q. Did these conversations occur all over the County or some particular section?

A. Well, the area of the County where I spent most of my time due to the fact my chief customers were there were in Doylestown, Bristol and Sellersville.

Q. In those districts?

A. Yes; I heard mention made of it many, many times.

Q. In those conversations which you had with members of the public or citizens of that County, did the citizens have occasion to express their sentiments against the defendant Darcy as well as the others?

A. Yes sir —

BY MR. VAN ARTSDALEN: I object and move that the answer be stricken.

BY JUDGE MURPHY: The objection is sustained. Let the answer stand; sustain the objection.

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BY MR. MARGIOTTI:

Q. Will you state whether there was anything said, no matter what you call it, concerning the killing and the defendants, particularly Darcy, in these conversations?

A. Yes, those things were said.

BY MR. VAN ARTSDALEN: I don't believe that answer is responsive.

(303) BY JUDGE MURPHY: Well, so far as it adds any light at all, we will take it.

BY MR. MARGIOTTI:

Q. Will you state were there any opinions expressed to you by the men and women that you came in contact with?

A. Yes, many opinions adversely.

Q. Will you tell the Court in a general way just what was said to you, not your conclusions, but in general the substance of the conversations?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: We will take it subject to the objection.

BY MR. MARGIOTTI:

Q. Go ahead.

A. Well, I vividly remember the words, some of the words, that were said to me, that is at least in my presence. Some were directed to me and some were used in conversations in groups where I was present in various parts of Bucks County,

particularly the places I mentioned a short time ago, and the feeling was such —

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained.
What did you hear them say?

BY THE WITNESS: Why, I heard them say —

BY MR. MARGIOTTI: Follow the Court's suggestion.

A. I heard them say that "the boys were from out of town, from (304) Philadelphia, they had no place there, they should be given Bucks County justice." I heard the words "lynch," "hang" and "shot" many times.

Q. In what respect did you hear the word "hang"?

A. That "all the boys involved in the Feasterville hold-up should be hanged, should be shot."

Q. In what respect did you hear the word "lynch"?

A. In the same respect.

Q. In what respect did you hear the word "shot"?

A. In the same respect.

Q. And did—will you state whether or not you heard the expressions up to and during the time of the trials?

A. Yes sir, I did.

Q. And what would you say were the number of persons in your travels that you engaged in conversations with on the subject such as you have related to the Court?

A. Well, I couldn't give the number numerically, but there were a great many due to the area I covered.

Q. How frequently would you make those tours that you have mentioned?

A. There was no routine because naturally I would cover the

Howard R. Price—Direct

area and most of the customers who were giving me the greater amount of business at that time —

Q. Well, without a routine, about how often would you say you went to these various places that you mentioned?

A. Oh, some of those accounts I would see every month.

Q. What are you doing now, Mr. Price?

A. I am employed as the Territory Manager in the State of Virginia, the District of Columbia, parts of West Virginia, parts of the State of Maryland, parts of the State of Delaware for an automotive (305) replacement parts manufacturer in Toledo, Ohio.

Q. Are you a married man?

A. Yes sir.

Q. Do you have a family?

A. Yes sir.

Q. Do you have children?

A. Yes sir.

Q. How old are you?

A. I will be forty-five next month.

Q. And what education have you had?

A. I didn't graduate from high school.

Q. How far did you go in high school?

A. Two years.

Q. Mr. Price, don't answer this question until the Court tells you to, please. From the conversations—strike that. Did you read any other papers concerning the case other than the ones you have mentioned?

A. No sir; I only read those three.

Q. And during the trials did you read any other papers?

A. No other papers, no sir.

Q. Did you hear any comments by radio or television?

A. At that time at home we didn't have a television set but I do recall listening to radio reports at times.

Q. Was that during the trial?

A. Well, I am hazy on that. I don't know if it was during the trial.

Q. Well, from the conversations that you had with these people are you able—were you able to form an opinion in your own mind concerning the sentiment of the persons with whom you came in contact?

(306) A. Yes sir, I was.

Q. Will you state to the Court, please, what that sentiment was?

BY MR. VAN ARTSDALEN: I object.

BY JUDGE MURPHY: The objection is sustained. It may be considered—the question was will you state what the sentiment was? and if you mean for him to give the Court facts, we will hear all of the facts; if you mean for him to give a conclusion; characterize things he heard, the objection is sustained.

BY MR. MARGIOTTI: I mean for him to give his own opinion as to what the sentiment was from what he had heard.

BY JUDGE MURPHY: The objection is sustained; but we will hear all the facts.

BY MR. MARGIOTTI: All right; that is in keeping with your previous ruling.

You may cross-examine.

CROSS-EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Price, where were you born?

A. Philadelphia.

Q. And when?

A. 1909.

Q. You say you moved to Bucks County in 1944?

A. That is right. I believe it was April 1944.

(307) Q. Where were you living prior to that?

A. Philadelphia.

Q. Now Andalusia is in the far southeasterly tip of Bucks County, is that correct?

A. That is right.

Q. How far is it from Doylestown, Pennsylvania?

A. Between twenty and twenty-five miles.

Q. Now the first that you heard of this killing I believe you said was by the papers, is that correct?

A. I am quite sure that was so.

Q. Was that the Philadelphia papers or one of the Bucks County papers?

A. It, in all probability, would be the morning —

Q. Do you know?

A. I am assuming it was the morning Inquirer.

Q. You are not sure?

A. I am not sure.

Q. Now, were you in Doylestown during the Foster-Zietz trial?

A. No sir.

Q. Were you in Doylestown during the Darcy trial?

A. No sir.

Q. Were you in Bucks County during either of those trials?

A. I was.

Q. These statements that you say you heard, can you recall who made any of those statements to you?

A. You mean by name —

Q. Yes.

A. No.

Q. Did you know the persons to whom you were talking or from whom you heard those statements?

A. You mean do I know them personally —

(308) Q. Yes.

A. No.

Q. Did you know them by sight?

A. Some of them I did.

Q. You had seen some of them before?

A. That is right.

Q. Can you portray or tell us any precise statement that was made at any time in any place?

A. Yes, I can.

Q. What?

A. At the ABC Auto Supply Co. in Sellersville during a discussion with a man on the counter and three or four of his customers, residents apparently of Sellersville, at least businessmen there in an automotive replacement parts business.

Q. They were persons in the store?

A. They were persons in the store.

BY JUDGE MURPHY: Time, please?

BY MR. VAN ARTSDALEN:

Q. Do you know when this was, sir?

BY JUDGE MURPHY: The month, year, approximately.

BY THE WITNESS: I believe it was prior to the trials.

BY JUDGE MURPHY: How long prior?

BY THE WITNESS: In the Spring of 1948.

BY MR. VAN ARTSDALEN:

Q. But you are not sure?

Howard R. Price—Cross

(309) A. I know it was in the Spring of 1948 but I am not sure of the month.

Q. Go ahead; you haven't finished the answer.

A. You want to know what I heard in the store —

Q. Yes.

A. I heard this group of three or four or five persons discussing it and they said "that if they had anything to do with it they would see that the boys were lynched." There is one place I heard the word "lynched" mentioned.

Q. But you don't know that they had anything to do with it, do you?

A. I only know they were residents of Bucks County apparently from their talk.

Q. You don't even know that?

A. They intimated that; they said "coming into our County."

Q. Sellersville is where in relation to Doylestown?

A. West.

Q. West of Doylestown. How far west?

A. I can't recall that.

Q. You don't know how far Sellersville is from Doylestown?

A. I never drove from Sellersville to Doylestown.

Q. You are familiar with Doylestown, aren't you—Sellersville?

A. That is right.

Q. The roads of Bucks County?

A. Certain roads of Bucks County.

Q. I take it then you travel principally then on certain highways, is that correct?

A. That is right.

Q. Now, did you ever at any time see any demonstrations existing against any of these defendants?

(310) A. You mean physical demonstrations —

Q. Yes sir.

A. Verbally only.

Q. Verbally only. And what was the nearest place in point of time to the time of the Darcy trial —

A. I would say within a month probably.

Q. That you heard statements? You mean within a month prior to the Darcy trial you heard statements concerning the trial?

A. That is right.

Q. To whom did you first give this information, Mr. Price, that you have now testified to?

A. I gave information in a letter which I had notarized—in a statement which I had notarized.

Q. When?

A. I believe it was in January of this year.

Q. And to whom did you send the letter?

A. I gave it to a mutual friend of Inez Darcy—a mutual friend of hers and mine.

BY MR. MARGIOTTI: For the record, Inez Darcy is a sister of the defendant.

BY JUDGE MURPHY: We will take everything under oath. This witness will handle that.

BY MR. VAN ARTSDALEN:

Q. Do you know if Inez Darcy is a sister to the Relator?

A. She is.

Q. What was your purpose in giving this letter to the mutual friend?

A. Justice.

Q. Who was the mutual friend?

A. I. M. Minkoff, a prescription druggist in Philadelphia.

(311) Q. Was that letter sent in response to a request made to you?

Howard R. Price—Cross

A. Mr. Minkoff asked me of my opinions at the time and he asked me if I would put them in a letter and have that letter notarized.

Q. When did he ask you of your opinions?

A. December of 1953.

Q. In other words, it wasn't until December of 1953 that you ever told anybody about these alleged statements?

A. Oh, no. I discussed it many times—many years before that.

Q. Do you know what is Mr. Minkoff's address?

A. Yes, I do. It is on Sandro and Larch Streets in Philadelphia.

Q. He is a prescription druggist, is that correct?

A. That is right, registered pharmacist.

Q. Are you friendly with him?

A. He and I are friends.

Q. Now during the time from the shooting up until the time of the trial how much of the time were you in Bucks County?

A. Well, I lived in Bucks County.

Q. That is right, sir. But didn't your business take you out of Bucks County a great deal?

A. Well, I returned to my home more nights than I spent away from my home.

Q. These places that you visited in Doylestown, Bristol and Sellersville, how many places were there altogether?

A. I had one business account in Bristol, two in Doylestown and one in Sellersville.

Q. Would you make both calls in Doylestown at the same time when you were in town?

A. That is right.

Q. Now you have testified, I believe, that you went around to see your customers about once a month, is that correct?

(312) A. To the best of my recollection, depending on the customer.

Q. Were you in Doylestown, Bristol or Sellersville on any occasion from the time of the shooting up until the time of the trial except on business?

A. I don't know.

Q. These conversations that you gave here taking place in Bucks County, were they all while you were making business calls?

A. Those that I have related were when I made business calls.

Q. And who had precipitated those conversations?

A. Well, there were times when the conversation was already in progress when I would make my call.

Q. Can you remember any specific time when that occurred?

A. The time I related at Sellersville the persons were already talking when I walked in.

Q. The persons were already talking when you walked in?

A. Yes sir.

Q. How long did the conversation take place after you walked in?

A. I can't recall that.

Q. Do you have any idea?

A. No.

Q. Did all the men remain there while you were there?

A. Of course, in a place of business like that men will come and go, come to buy automotive parts and go out and others will come in.

Q. You are not sure?

A. That is right.

Q. It wasn't a regular meeting or anything of that sort, was it?

A. Just a discussion.

Q. By customers, is that correct?

A. That is correct.

Q. And you never saw or observed anything beyond speaking or verbal (313) statements in relation to this case?

A. Only verbal statements.

Q. On any of the occasions when there were conversations about these trials did you ever start the conversation?

A. I never did.

Q. You are sure of that?

A. I am positive of it.

Q. You never took any interest in the case prior to coming to trial?

A. I took interest but I did not start conversations.

Q. You did not start conversations?

A. No, I was there on business.

Q. Despite your interest in it, you did not attend either of the trials?

A. I did not.

Q. Was your interest in the cases because of your mutual friendship of knowing one—I withdraw that. Was your interest in this case because of any acquaintance or knowledge you may have had of Inez Darcy?

A. It was not. May I elaborate? At the time—at the inception of this I didn't know that Inez Darcy and David Darcy were brother and sister.

Q. Did you know Inez Darcy at the time of this shooting?

A. Vaguely, I did.

Q. All right. What is the name of your present employer?

A. A. P. Parts Corporation, Toledo, Ohio.

(314) Q. Can you give us their address?

A. 1801 Spellbush Avenue, Toledo 1, Ohio.

BY MR. VAN ARTSDALEN: That is all.

(Exhibit marked "Relator's Exhibit No. 117.")

RE-DIRECT EXAMINATION

BY MR. MARGIOTTI:

Q. Mr. Price, I show you a sworn statement which you said you gave. Will you look at "Relator's Exhibit No. 117" and tell me whether that is it?

A. Yes, that is it.

Q. Did your wife sign a statement too?

A. Yes sir.

Q. You swore to it before a Notary Public?

A. Yes sir.

Q. Will you read it over?

A. Shall I read it aloud —

Q. No, no; just read it to yourself.

BY MR. MARGIOTTI: May the record show that we are exhibiting it to the District Attorney.

BY JUDGE MURPHY: Is Mrs. Price in Court?

BY MR. MARGIOTTI: I don't know.

BY MR. MARGIOTTI:

Q. Is Mrs. Price here?

A. No, she isn't.

BY MR. MARGIOTTI:

Q. She can come here, if necessary?

(315) A. If necessary.

BY MR. MARGIOTTI: If the Court please, the witness' credibility having been attacked, his statements having been

attacked in such a way as an inference drawn that his testimony is of recent fabrication, for the purpose of rehabilitating the witness on that account, for that reason we offer it as a consonant declaration, for that purpose only.

BY JUDGE MURPHY: The paper in question purports to be a statement by two people, one of whom is not in Court and subject to cross-examination. The paper in question in nowhere contains the expressions used by the witness on the stand and contains a series of conclusions contrary—I mean exactly the kind of conclusion which we ruled inadmissible in this trial.

BY MR. VAN ARTSDALEN: We object to the offer.

BY JUDGE MURPHY: The objection is sustained. However, for the purpose of the Appellate Court we will have the paper spread out on the record so they will have the facts before them, being a series of conclusions and nowhere are words used that were used in this hearing insofar as the word "lynching." "If they had anything to do with it they would see that the boys were lynched."

Did you anywhere in Bucks County at any time hear the word "lynch" except at Sellersville?

BY THE WITNESS: Yes sir, I did.

BY JUDGE MURPHY: Where else did you hear it? Can you name one person (316) that was present at the time you heard some discussion of lynching at Sellersville at the ABC? Can you name one person that participated in the lynching discussion?

BY THE WITNESS: By name, no sir, I can not.

Howard R. Price—Re-direct

BY JUDGE MURPHY: Who was your customer?

BY THE WITNESS: That was a branch of the ABC in Lansdale.

BY JUDGE MURPHY: Why were you there?

BY THE WITNESS: To make an inventory tool stop of their tools.

BY JUDGE MURPHY: For whom?

BY THE WITNESS: For myself.

BY JUDGE MURPHY: What company?

BY THE WITNESS: At that time one of the companies we represented was the Bond Tool and Forging Company in Allentown, Pennsylvania.

BY JUDGE MURPHY: So that you were there as a representative of the Bond Tool and Forging Company to take an inventory of what customer's tools?

BY THE WITNESS: (317) Of the ABC Automotive Supply people.

BY JUDGE MURPHY: Did you know any person there by name?

BY THE WITNESS: Well, the counter man—I knew their names at that time but I can't recall their names now.

BY JUDGE MURPHY: Well, on what other occasion did you hear the word "lynching" used?

BY THE WITNESS: I heard it at the service station in Andalusia.

BY JUDGE MURPHY: What was your occasion for being there?

BY THE WITNESS: I was buying gasoline.

BY JUDGE MURPHY: Who was it used the word "lynching"?

BY THE WITNESS: One of the other customers who come in there.

BY JUDGE MURPHY: Tell us what happened there. That is important. Tell us what happened. We want the details. When was it first, what month, your best judgment?

BY THE WITNESS: Well, I think that that was in the Winter of 1947-48.

(318) BY JUDGE MURPHY: The Winter?

BY THE WITNESS: That is right.

BY JUDGE MURPHY: Will you tell us whether it was after Christmas or before Christmas?

BY THE WITNESS: It was after Christmas.

BY JUDGE MURPHY: How long after—about?

BY THE WITNESS: I would say it was well into January.

BY JUDGE MURPHY: Well into January. You were in a gas station in some town—what town was it?

BY THE WITNESS: Andalusia where I lived.

BY JUDGE MURPHY: You were in a gas station in your home town?

BY THE WITNESS: That is right.

BY JUDGE MURPHY: What did you hear then?

BY THE WITNESS: I heard the word "lynch" mentioned.

BY JUDGE MURPHY: As best you can, give us its contents. What date?

BY THE WITNESS: Well, as near as I can recall, and I can't recall the (319) exact words because the word "lynch" is the word stood out in my mind —


BY JUDGE MURPHY: Well, give us your best recollection.

BY THE WITNESS: To my best recollection, the statement was made "If this man had anything to do with it he would like to have the boys lynched"—to the best of my recollection.

BY JUDGE MURPHY: Did you know him?

BY THE WITNESS: No, he was a customer.

BY JUDGE MURPHY: Did you know anyone that was there besides yourself?



Howard R. Price Re direct

BY THE WITNESS: I knew the boy who operated the service station.

BY JUDGE MURPHY: What is his name? He was where he could hear the conversation?

BY THE WITNESS: No, he was not there at the time.

BY JUDGE MURPHY: Was there anybody there that you knew that heard this man say the word "lynch"?

BY THE WITNESS: No one that I knew by name, sir.

BY JUDGE MURPHY: Was Mrs. Price there? Was she with you in Sellersville?

BY THE WITNESS: (320) No sir.

BY JUDGE MURPHY: Was she with you in Andalusia?

BY THE WITNESS: At that gas station that morning —

BY JUDGE MURPHY: Yes.

BY THE WITNESS: No sir.

BY JUDGE MURPHY: Where else did you hear the word "lynch"?

BY THE WITNESS: I can't give a definite location. Those are the only two I retained. I had reason to. One I did business with and the other did business with me. I can't recall exact locations—whether Andalusia or other parts of Bucks County. I can't recall that.

BY JUDGE MURPHY: The next one—the Court feels is highly pertinent—has not been covered. The Court has to wrestle with it. Where did you hear the expression “Bucks County justice”?

BY THE WITNESS: I believe I heard that at the same time I heard the word “lynch” at Sellersville. To the best of my recollection, that is where I heard it.

BY JUDGE MURPHY: Any other time?

BY THE WITNESS: At that particular place, that is the only time.

(321) BY JUDGE MURPHY: “Bucks County justice” you heard that once, apparently, at Sellersville where you heard the word “lynch”?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: You heard the word “lynch” at a gas station in Andalusia?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: What other term —

BY THE WITNESS: “Shot” and “hang.”

BY JUDGE MURPHY: Where did you hear the word “hang”?

BY THE WITNESS: I am sure one of the places I did hear it was at the post office at Andalusia.

~~Howard R. Price - Re-direct~~

BY JUDGE MURPHY: The post office at Andalusia. When?

BY THE WITNESS: Frankly, I can't place the time.

BY JUDGE MURPHY: Was it spring, winter or summer?

BY THE WITNESS: To the best of my recollection, it was warm weather.

BY JUDGE MURPHY: Warm weather. Now the post office at Andalusia, I suppose, is a small post office?

BY THE WITNESS: Yes sir.

(322) BY JUDGE MURPHY: Who was present then when you heard that said, the word "hang"?

BY THE WITNESS: You mean the names of persons by name —

BY JUDGE MURPHY: If you know:

BY THE WITNESS: I didn't know either of the two or three persons talking in the lobby of the post office at the time.

BY JUDGE MURPHY: Well, it was some time when it was warm you went into the post office in Andalusia and you heard some two or three people and somebody used the word "hang," is that right?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: Now, to your best recollection, what did they say?

Howard R. Price—Re-direct

BY THE WITNESS: Well again I can't recall the exact words but it was on the lines that "they would hang them."

BY JUDGE MURPHY: Was it more than one person said it; was it all three said it; or what?

BY THE WITNESS: I can't recall that.

BY JUDGE MURPHY: Was your wife with you on that occasion?

BY THE WITNESS: No sir.

(323) BY JUDGE MURPHY: Did you hear the words "hang," "lynch," or "Bucks County justice" any place else?

BY THE WITNESS: I didn't hear the words "Bucks County justice" any place else.

BY JUDGE MURPHY: Did you heard the word "lynch" more than twice?

BY THE WITNESS: Yes sir, I did.

BY JUDGE MURPHY: Where?

BY THE WITNESS: I can't identify the location of those places.

BY JUDGE MURPHY: When?

BY THE WITNESS: I would also say it was during the warm weather in 1948.

BY JUDGE MURPHY: You have no idea where?

Howard R. Price—Re-direct

BY THE WITNESS: Well, I was in so many places in Bucks County I can't pin-point.

BY JUDGE MURPHY: The reason I am asking you is it is such an un-American and revolting word. This Court wants all the information we can get on it. And you are the witness.

Where else between December 1947 and June 1948 did you hear the word "lynch" in connection with these boys?

(324) BY THE WITNESS: I can't give a definite geographic location in Bucks County.

BY JUDGE MURPHY: Did you ever tell anybody you heard the word "lynch"?

BY THE WITNESS: I am quite certain I did.

BY JUDGE MURPHY: Who?

BY THE WITNESS: I can't recall that.

BY JUDGE MURPHY: No one at all?

BY THE WITNESS: No; I spoke in general conversation to many persons.

BY JUDGE MURPHY: Did you ever tell anyone you heard the word "lynch" before you came into the courtroom?

BY THE WITNESS: Yes sir.

BY JUDGE MURPHY: Where?

BY THE WITNESS: I discussed it when I was living in Bucks County.

Howard R. Price—Re-direct

BY JUDGE MURPHY: With whom?

BY THE WITNESS: That I can't recall—the names of the persons.

BY JUDGE MURPHY: That is all.

(325) We will have the letter spread in the record. We will sustain the objection but it is there for the Appellate Court to see.

Relator's Exhibit No. 117:

#1

Mrs. Howard R. Price
1615 Westwood Road
Charlottesville, Virginia

January 9, 1954

Gentlemen,

We the undersigned, who were residents of Bucks County, Pennsylvania, from April 1944 to December 1952, would like to add our small voices to what we believe to be a miscarriage of justice.

The year 1948, when we were residents of Andalusia, Bucks County, is recalled very clearly. Many of our neighbors, acquaintances and friends were discussing the holdup of the Feasterville Inn, and of the trial of the boys accused of taking part in it. Their discussions were mostly based on reports they had read in the Philadelphia and Bucks County newspapers, and on local radio programs, that had reenacted the alleged crimes.

Local feeling was running extremely high, and prejudgment of the guilt of the boys named by the newspapers and radio stations, was made by many.

There seemed to prevail a feeling of unjust condemnation, engendered by the diligent persistence of the newspapers and radio stations, in their prejudgment of guilt of the accused.

Howard R. Price—Re-direct

So many of the persons with whom we (326) spoke were
 "#2

unreasonably vehement as they pronounced the guilt of all the boys named by the newspapers and radio stations.

Individual thinking had been molded into a mass belief of absolute guilt. We the undersigned feel strongly that a fair trial under these circumstances was impossible.

We still hold the belief that every accused person is entitled to a fair and impartial hearing. Due to the thinking of the people of Bucks County at the time of this trial, we do not think David Darcy could have received an unbiased hearing in the local courts.

Our plea is that this fair hearing be granted.

(Signed) Howard R. Price

(Signed) Nancy T. Price

Sworn to and subscribed before
 me this Thirteenth Day of
 January A. D. 1954.

(Signed) John B. Wightman

Notary Public

(Seal)

My Commission expires Jan. 6, 1957."

RE-DIRECT EXAMINATION (Continued).

BY MR. MARGIOTTI:

Q. Where did you hear the word "shoot"?

A. Well, I heard that many times but I can't pin-point that to geographic location.

Q. What was the substance of the conversation in which the word "shoot" was used?

A. Well, as I recall, that would follow: the persons were saying "They would shoot the boys as a result of their coming

from Philadelphia into Bucks County and committing the crime."

(327) BY MR. MARGIOTTI: That is all.

BY JUDGE MURPHY: Did you ever report to the police that you heard people say they were going to lynch someone?

BY THE WITNESS: No sir, I did not.

RE-CROSS EXAMINATION.

BY MR. VAN ARTSDALEN:

Q. Mr. Price, you have frequently referred to the word, the "boys." Did you hear the name Darcy mentioned in any of these conversations that you have just testified to?

A. I don't recall hearing any definite names other than the grouping of the four boys and the Feasterville Inn.

Q. In other words, you are not positive, are you, that they were referring to Darcy or to Foster and Zietz?

A. Well, their references, as I said, were to the four boys and the Feasterville Inn.

BY MR. VAN ARTSDALEN: That is all.

(Witness excused.)